Labour Law and Urban Law in Canada

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Labour Law and Urban Law in Canada

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FOREWORD

When the members of the Rowell-Sirois Commission began their collective task in 1937, very little was known about the evolution of the Canadian economy. What was known, moreover, had not been extensively analyzed by the slender cadre of social scientists of the day.

When we set out upon our task nearly 50 years later, we enjoyed a substantial advantage over our predecessors; we had a wealth of information. We inherited the work of scholars at universities across Canada and we had the benefit of the work of experts from private research institutes and publicly sponsored organizations such as the Ontario Economic Council and the Economic Council of Canada. Although there were still important gaps, our problem was not a shortage of information; it was to interrelate and integrate — to synthesize — the results of much of the information we already had.

The mandate of this Commission is unusually broad. It encompasses many of the fundamental policy issues expected to confront the people of Canada and their governments for the next several decades. The nature of the mandate also identified, in advance, the subject matter for much of the research and suggested the scope of enquiry and the need for vigorous efforts to interrelate and integrate the research disciplines. The resulting research program, therefore, is particularly noteworthy in three respects: along with original research studies, it includes survey papers which synthesize work already done in specialized fields; it avoids duplication of work which, in the judgment of the Canadian research community, has already been well done; and, considered as a whole, it is the most thorough examination of the Canadian economic, political and legal systems ever undertaken by an independent agency.

The Commission's research program was carried out under the joint

direction of three prominent and highly respected Canadian scholars: Dr. Ivan Bernier (*Law and Constitutional Issues*), Dr. Alan Cairns (*Politics and Institutions of Government*) and Dr. David C. Smith (*Economics*).

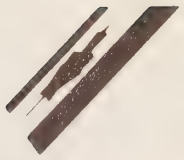
Dr. Ivan Bernier is Dean of the Faculty of Law at Laval University. Dr. Alan Cairns is former Head of the Department of Political Science at the University of British Columbia and, prior to joining the Commission, was William Lyon Mackenzie King Visiting Professor of Canadian Studies at Harvard University. Dr. David C. Smith, former Head of the Department of Economics at Queen's University in Kingston, is now Principal of that University. When Dr. Smith assumed his new responsibilities at Queen's in September 1984, he was succeeded by Dr. Kenneth Norrie of the University of Alberta and John Sargent of the federal Department of Finance, who together acted as Co-directors of Research for the concluding phase of the Economics research program.

I am confident that the efforts of the Research Directors, research coordinators and authors whose work appears in this and other volumes, have provided the community of Canadian scholars and policy makers with a series of publications that will continue to be of value for many years to come. And I hope that the value of the research program to Canadian scholarship will be enhanced by the fact that Commission research is being made available to interested readers in both English and French.

I extend my personal thanks, and that of my fellow Commissioners, to the Research Directors and those immediately associated with them in the Commission's research program. I also want to thank the members of the many research advisory groups whose counsel contributed so substantially to this undertaking.

DONALD S. MACDONALD

INTRODUCTION



At its most general level, the Royal Commission's research program has examined how the Canadian political economy can better adapt to change. As a basis of enquiry, this question reflects our belief that the future will always take us partly by surprise. Our political, legal and economic institutions should therefore be flexible enough to accommodate surprises and yet solid enough to ensure that they help us meet our future goals. This theme of an adaptive political economy led us to explore the interdependencies between political, legal and economic systems and drew our research efforts in an interdisciplinary direction.

The sheer magnitude of the research output (more than 280 separate studies in 70+ volumes) as well as its disciplinary and ideological diversity have, however, made complete integration impossible and, we have concluded, undesirable. The research output as a whole brings varying perspectives and methodologies to the study of common problems and we therefore urge readers to look beyond their particular field of interest and to explore topics across disciplines.

The three research areas, — *Law and Constitutional Issues*, under Ivan Bernier; *Politics and Institutions of Government*, under Alan Cairns; and *Economics*, under David C. Smith (co-directed with Kenneth Norrie and John Sargent for the concluding phase of the research program) — were further divided into 19 sections headed by research coordinators.

The area *Law and Constitutional Issues* has been organized into five major sections headed by the research coordinators identified below.

- Law, Society and the Economy — *Ivan Bernier and Andrée Lajoie*
- The International Legal Environment — *John J. Quinn*
- The Canadian Economic Union — *Mark Krasnick*

- Harmonization of Laws in Canada — *Ronald C.C. Cuming*
- Institutional and Constitutional Arrangements — *Clare F. Beckton and A. Wayne MacKay*

Since law in its numerous manifestations is the most fundamental means of implementing state policy, it was necessary to investigate how and when law could be mobilized most effectively to address the problems raised by the Commission's mandate. Adopting a broad perspective, researchers examined Canada's legal system from the standpoint of how law evolves as a result of social, economic and political changes and how, in turn, law brings about changes in our social, economic and political conduct.

Within *Politics and Institutions of Government*, research has been organized into seven major sections.

- Canada and the International Political Economy — *Denis Stairs and Gilbert Winham*
- State and Society in the Modern Era — *Keith Banting*
- Constitutionalism, Citizenship and Society — *Alan Cairns and Cynthia Williams*
- The Politics of Canadian Federalism — *Richard Simeon*
- Representative Institutions — *Peter Aucoin*
- The Politics of Economic Policy — *G. Bruce Doern*
- Industrial Policy — *André Blais*

This area examines a number of developments which have led Canadians to question their ability to govern themselves wisely and effectively. Many of these developments are not unique to Canada and a number of comparative studies canvass and assess how others have coped with similar problems. Within the context of the Canadian heritage of parliamentary government, federalism, a mixed economy, and a bilingual and multicultural society, the research also explores ways of rearranging the relationships of power and influence among institutions to restore and enhance the fundamental democratic principles of representativeness, responsiveness and accountability.

Economics research was organized into seven major sections.

- Macroeconomics — *John Sargent*
- Federalism and the Economic Union — *Kenneth Norrie*
- Industrial Structure — *Donald G. McFetridge*
- International Trade — *John Whalley*
- Income Distribution and Economic Security — *François Vaillancourt*
- Labour Markets and Labour Relations — *Craig Riddell*
- Economic Ideas and Social Issues — *David Laidler*

Economics research examines the allocation of Canada's human and other resources, the ways in which institutions and policies affect this

allocation, and the distribution of the gains from their use. It also considers the nature of economic development, the forces that shape our regional and industrial structure, and our economic interdependence with other countries. The thrust of the research in economics is to increase our comprehension of what determines our economic potential and how instruments of economic policy may move us closer to our future goals.

One section from each of the three research areas — The Canadian Economic Union, The Politics of Canadian Federalism, and Federalism and the Economic Union — have been blended into one unified research effort. Consequently, the volumes on Federalism and the Economic Union as well as the volume on The North are the results of an interdisciplinary research effort.

We owe a special debt to the research coordinators. Not only did they organize, assemble and analyze the many research studies and combine their major findings in overviews, but they also made substantial contributions to the Final Report. We wish to thank them for their performance, often under heavy pressure.

Unfortunately, space does not permit us to thank all members of the Commission staff individually. However, we are particularly grateful to the Chairman, The Hon. Donald S. Macdonald; the Commission's Executive Director, J. Gerald Godsoe; and the Director of Policy, Alan Nymark, all of whom were closely involved with the Research Program and played key roles in the contribution of Research to the Final Report. We wish to express our appreciation to the Commission's Administrative Advisor, Harry Stewart, for his guidance and advice, and to the Director of Publishing, Ed Matheson, who managed the research publication process. A special thanks to Jamie Benidickson, Policy Coordinator and Special Assistant to the Chairman, who played a valuable liaison role between Research and the Chairman and Commissioners. We are also grateful to our office administrator, Donna Stebbing, and to our secretarial staff, Monique Carpentier, Barbara Cowtan, Tina DeLuca, Françoise Guilbault and Marilyn Sheldon.

Finally, a well deserved thank you to our closest assistants: Jacques J.M. Shore, *Law and Constitutional Issues*; Cynthia Williams and her successor Karen Jackson, *Politics and Institutions of Government*; and I. Lilla Connidis, *Economics*. We appreciate not only their individual contribution to each research area, but also their cooperative contribution to the research program and the Commission.

IVAN BERNIER
ALAN CAIRNS
DAVID C. SMITH

This volume of research is part of the output of the Royal Commission research program of Law and Constitutional Issues and falls within its section entitled Law, Society and the Economy. This section serves as both an introduction and background to all the Commission's research on law. It analyzes how law has evolved under the pressure of social and economic change and how it in turn has brought about changes in our social and economic conduct. Our objective was to highlight the relationship of law to the state, society and the economy. Our ultimate aim was to show how law affects Canadian society and to reveal its potential and limitations as an instrument for implementing government policy. In particular, we have addressed criticisms that focus on the multiplication of laws, regulations and tribunals as instruments of state intervention; on the complexity of our legal system and its essentially conflictual nature; and on the confusing character of the law and its apparent incapacity to respond to the needs of all Canadians.

We trust that with the inventory taken and the conclusions drawn in this section, we have provided the Commission with insight into one of the most fundamental issues confronting it — the role of the state in Canadian society. To inquire about the role of the state is to also question the role of law.

The two subjects discussed in this volume both raise in practical terms the problem of the proper level of intervention for dealing with certain types of problems, leaving aside the traditional federal-provincial dichotomy. In the case of labour relations, the problem concerns functional decentralization at the level of the enterprise, and in the case of urban law, territorial decentralization at the level of local communities. In each of the three papers in this volume, there is a clear indication that

such decentralization as may have existed until now may be threatened by an accelerating tendency toward centralization at the state level, provincial and federal.

For Weiler, who writes about the role of law in labour relations, there is no doubt that the law operates most effectively when it enhances opportunities for the parties, as responsible industrial citizens, to exercise their rights of self-government. He believes that this conclusion speaks in favour of maintaining collective bargaining as the basic approach in labour relations. Writing about urban law and policy development in Canada, Makuch similarly points out that despite the often-made claim that municipal governments can best appreciate and respond to local values, there is no real provision for this in the Canadian political system. To the extent that a subdued argument is made in favour of centralization, it comes from Morin and Leclerc. They write about labour law developments in Quebec and argue that the large number of workers not covered by collective agreements may to some extent have justified the government in its desire to guarantee legislatively a minimum of rights to workers. But whatever the position taken, each paper provides a penetrating analysis of present-day problems in labour law and urban law.

IVAN BERNIER
ANDRÉE LAJOIE

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I.B. AND A.L.

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The Role of Law in Labour Relations

JOSEPH M. WEILER

Introduction

Any discussion of the "role of law" must begin with a definition of what the writer means by the term "law." In the context of this paper, I use the word law to refer to the full range of rules that shape human conduct in labour-management relations. These rules would include constitutional provisions, statutory enactments, the jurisprudence of the courts and administrative tribunals, and contractual provisions of collective agreements. Each of these legal devices has helped shape the direction of social policy in the workplace.

When the Canadian labour law system is compared to those of other Western industrialized nations, it appears that Canadians have as many laws, rights and freedoms in the labour relations context as any other country. We rely heavily on the law to solve our problems. One eminent commentator laments: "The system is highly legalistic, with more rules and regulations for peace-time than most Western industrialized democracies have felt constrained to adopt in times of national crisis."[1]

Yet, as we enter the last 15 years of this century, we hear the clamour for more regulation by government to meet the economic challenges facing Canada. I do not believe that more labour legislation is the answer to our problems. In my view, the quick legal solutions that have been applied to labour relations for the past 40 years have exhausted the capacity of the law to achieve the productive, competitive and full employment economy that we want. In many ways, our attention has been directed to tinkering with the labour law system rather than improving labour-management relations. Now it is time for the major participants in the economy to adopt different strategies to make our

system work. This does not mean turning back the clock and taking away the rights and freedoms that workers and management have been granted by our legal system. Rather, we need mechanisms that will promote cooperation and compromise, devices that will bring about a consensus that involves a sense of community for Canada. This search for consensus in its practical meaning need not involve a compromise of principle, but it does involve a need for the participants to show restraint in the search for an equitable sharing of the proceeds of the economic wealth generated in our country. This quest for consensus will require a change of attitude in our labour-management community. What is needed is a mutual recognition that workers and managers are partners in an enterprise, that their shared interests are more important than their conflicting interests. The law on its own cannot produce this state of mind. The law can, however, play a useful role in creating appropriate institutional structures which provide an environment in which labour-management conflict can be accommodated.

This paper will focus on a number of key events in the evolution of our labour law system. It will describe the lawmakers' perception of the purpose of these changes and will then assess whether these reforms were successful in meeting these expectations. On the basis of these experiences I hope to draw some useful conclusions about the utility of the law as a vehicle for developing and representing social values.

The Evolution of Collective Bargaining

Collective Action to 1906

Although the period from 1945 to the present will be the primary focus of this study, the major initiatives which produced Canada's legal system of collective bargaining were in direct response to events that occurred during or immediately after World War II. To understand the significance of these legal events, it is necessary to look further back in our history; the post–World War II legislation, for the first time, adopted a full-scale system of collective bargaining as national labour policy — a significant change in the direction of our social policy.

In a nutshell, Canada's legal regime, which had been antagonistic to collective bargaining in the 19th century and neutral to it until World War II, has provided from then on a favourable environment for its spread. What is to be emphasized is that this adoption of collective bargaining as desirable economic and social policy was the result of an effort to secure industrial peace and continuous production as part of the war effort. That collective bargaining would similarly be embraced as sound economic policy during peacetime was not then and still has never been accepted wholeheartedly in many quarters of Canadian society. But now that the rights and freedoms derived from collective bargaining law have

become entrenched in our social fabric, the lessons of Canadian labour history tell us that it will be extremely difficult to remove them without widespread and sustained opposition.

During Canada's first century there was a slow but continuous growth in collective bargaining rights. In the mid-19th century there were criminal and civil constraints on both individual and group action by workers. For example, until the 1870s, if an employee breached his contract he was guilty of a crime.[2] The legality of peaceful picketing in criminal law was in doubt until the *Criminal Code* specifically authorized it in the 1930s.[3]

Workers who engaged in collective withdrawal of their labour were considered to be involved in a criminal conspiracy. The policy behind these common law crimes had its roots in English legal theory. English judges believed that the use of economic power by working people acting in concert was harmful to the English economy. Since individual refusal to work had no discernible effect on the national economy, the crime lay in the combination of workers for this purpose. Although the judiciary assumed that the marketplace should control the setting of wages, the judges reasoned that this should be limited to the individual worth of an employee's labour, not the collective value of the work of a group of employees. Why? Because this would unduly infringe upon the employer's freedom of contract. Employers would be unable to resist the collective demands of workers. Eventually, workers' wages would rise to the point where the economy would be damaged, as England lost world markets owing to its high domestic production costs.

Canadian courts accepted this reasoning, and until the 1870s Canadian workers were similarly impeded in exercising collective pressure on employers. However, following an unpopular conspiracy prosecution against the Toronto Typographical Union in 1872, several statutes were enacted that in effect restricted the application of the offence of criminal conspiracy. No longer was it a crime for workers to perform an act in concert, e.g., to withdraw their services, which would not be a criminal offence if performed by one person. However, it remained an offence to use threats of violence in an attempt to coerce a person to engage in union activity.[4] Subsequent statutory amendments were to legalize the refusal of the labourer to work with another worker or for an employer.[5]

Collective action by workers was also subject to civil law constraints during the 19th century. Until the 20th century, unions of workers were not given legal status and as a result were denied access to the courts to enforce their contracts. Combinations of workers withdrawing services were considered to be harmful to the private property rights of employers and their customers and thus were held to be tortious conspiracies in restraint of trade.

Potential tort liability for collective withdrawal of labour constituted a severe impediment to workers. This judicial regulation of labour activity

through the civil law inhibited the freedom of action which the repeal of criminal sanctions had permitted. In 1906, England reversed this civil liability with the enactment of the *Trade Disputes Act*. The first three sections of this statute relieved trade union members and officials from liability for conduct which had previously been held to be unlawful. Section 1 abolished the doctrine of civil conspiracy. Section 2 legalized peaceful picketing. Section 3 granted relief against liability for inducing breach of a contract of employment. These three sections, however, dealt only with conduct in contemplation of or in furtherance of a trade dispute. Section 4(1) went much further. It conferred upon trade unions as such a blanket immunity against liability in tort. By this statute collective bargaining was completely legalized in England. However, with the exception of a more limited protection of collective bargaining in the *Trade Unions Act* of British Columbia, no such statutory emancipation from civil liability for unions occurred in other Canadian jurisdictions.[6] It was not until the mid-20th century that the civil legality of trade union activity was clarified in collective bargaining legislation.

In summary, the latter part of the 19th century saw a significant shift in industrial relations policy. Through the vehicle of statutory law reform as outlined above, unions became a legitimate part of the Canadian industrial relations scene. Workers were free to join unions and to withdraw their services in concert without incurring criminal penalties. The Canadian labour force, which previously had included large numbers of indentured servants, coolie labour, habitants and tenant farmers, had become almost entirely a nation of free workers and agricultural entrepreneurs. As Arthurs noted:

> No longer bound to master or landlord by criminal sanctions or seigneurial obligation, the Canadian wage earner was free to sell his labour, or the fruits of his labour, on the open market. The price at which he would sell was, of course, subject to negotiation, but in law he was free to contract on almost any terms he wished.[7]

By the latter part of the 20th century, national industrial policy had created a dramatically different legal environment for the Canadian worker. Rather than living in a world of private individual contract, the worker now works in an environment of rights and duties created by statutes and collective agreements. As Canada entered its second century in 1967, Arthurs referred to this new status of the Canadian worker as an "industrial citizen," governed by rights and obligations that flow, not from individual contracts of employment, but from membership in the industrial community of "employees."

The Period 1906–44

Many factors helped shape the emerging national industrial policy of the 20th century, but this paper will examine only three key legal events

which played paramount roles in developing an affirmative Canadian labour policy favouring collective bargaining. It is within this context that the concept of "industrial citizen" emerged.

The first major step in the evolution of the distinctly Canadian industrial relations system was the enactment by Parliament of the *Industrial Disputes Investigation Act* of 1907 (hereinafter referred to as the *IDI Act*).[8] Its full title was "An Act to Aid in the Prevention and Settlement of Strikes and Lockouts in Mines and Industries Connected with Public Utilities." The statute responded to public pressure for legislative action to avoid the harm to society caused by bargaining strikes. A coal strike in Lethbridge, Alberta, in 1906 had caused a serious shortage of fuel in the Prairie provinces and this led directly to federal statutory initiative in the *IDI Act* to attempt to achieve industrial peace through the process of conciliation.

On its own terms, the *IDI Act* applied only to disputes in the transportation, communications, mining and utilities sectors of the economy. However, other industries could take advantage of the conciliation mechanisms in the act if both parties consented. The act provided for an ad hoc tripartite conciliation board to determine the "merits" of the dispute, attempt to achieve an agreement, issue a report on the causes, facts and circumstances of the dispute, and make a "recommendation of settlement for the dispute according to its merits and substantial justice of the case." The report of the board was to be published with the hope that public opinion would bring pressure to bear on the parties to reach a settlement. The parties could also jointly agree to be bound by the recommendations of the board, in which case the board's report would be made a judgment of a court and would be enforceable as such.

Compulsory investigation, with both parties required to sit face to face at the bargaining table, was the device whereby, it was hoped, the conference and discussion mode of conflict resolution would be secured, which in the past had usually taken place only after the union was driven to take the rigorous and harmful step of bringing about a suspension of work.[9] A key ingredient of this scheme was to accomplish a mandatory recognition of a bargaining relationship between the parties, thereby avoiding the need for the union to resort to strike action to achieve acceptance by the employer as the exclusive bargaining representative of its employees. In addition, the *IDI Act* provided that, throughout this period of conciliation, working conditions could not be changed nor could the parties engage in strikes or lockouts. Thus, although the emphasis in the *IDI Act* was on getting the parties to meet and negotiate, the ultimate goal was to have the dispute resolved without a work stoppage. But the latter purpose could be effective only if the key issue of whether the employer would recognize the union's bargaining authority was resolved first.[10]

The *IDI Act*'s restriction on work stoppage during the period of a third-party intervention proved to be a prominent feature of 20th-century

Canadian industrial relations policy. Canada was hereinafter launched on a road of industrial relations law reform which concentrated on two vital public policies: first, the purpose of government intervention in labour disputes is to achieve industrial peace; and second, industrial relations is an area of social conflict that cannot be regulated by traditional legal techniques. The policy established in the *IDI Act* was that conciliation by ad hoc tripartite boards is preferable to adjudication by judges as the favoured mechanism to resolve economic conflict between employers and unions. The Canadian government thereby recognized that the industrial relations community has its own peculiar needs and norms. The objective of Canadian labour law reform in the 20th century has been to articulate these norms and fashion the appropriate legal machinery for their enforcement. The major legislative initiatives in this regard were introduced in the mid-1930s.

However, in 1925, before these statutory enactments took place, a legal event occurred which was to have a major impact on the development of collective bargaining law in Canada. In the case of *Toronto Electric Commissioners v. Snider*, the Privy Council decided that the *IDI Act* was unconstitutional.[11] The lower Canadian courts had decided that collective bargaining, with its attendant risk of industrial disputes, justified preventative legislative action by the national government under its general power to make laws for the peace, order and good government of Canada. However, the Privy Council rejected this argument, presumably because it was persuaded that the provinces could supply the necessary "sedative." The Privy Council held that labour relations, which in the *Snider* case dealt with a municipal transit system, had no independent constitutional value of their own. Rather, the pith and substance of labour relations were that they were conducted through employment contracts, which were concerns of property and civil rights within the constitutional jurisdiction of the provinces. As a result of the *Snider* decision, the constitutional preference under Canadian federalism is diversity, experimentation, and local control of labour relations. If, however, employees work in an undertaking which is of sufficient national importance that its overall supervision has been allocated to the federal government, then so also should the labour relations component of that undertaking.[12] Accordingly, the Parliament of Canada has jurisdiction over labour relations in federal undertakings such as banks, the telephone service, pipelines, railways, the federal public service and so forth.

As a result of these constitutional law decisions, responsibility for the regulation of approximately 90 percent of Canadian workers rests with the provinces. As will be shown below, this division has complicated the coordination of policy making in Canadian industrial relations because the federal government has the major responsibility for managing the economy and yet has only a relatively small jurisdiction over securing industrial peace through collective bargaining legislation.

The *Snider* decision did not result in an immediate disintegration of national industrial relations policy. Many provinces passed enabling legislation making the *IDI Act* applicable to their jurisdictions. The major influence during this period that would shape the future of Canadian industrial relations policy was the result of developments in the United States.

Until the 1930s, there was little government regulation of labour-management relations in the United States. The parties were left to settle their own affairs according to their relative bargaining power. However, with the onset of the Great Depression and the experience of several massive, violent bargaining disputes, Congress was pressed to find new solutions to relieve industrial tension and to cure the economic doldrums of the time. Congress passed the *National Labour Relations Act* of 1935 (the *Wagner Act*).[13] The focus of the *Wagner Act* was to assist unions to organize employees and to require employers to bargain with the union. The economic strategy inherent in the statute was that collective bargaining would cause an increase in the wages and purchasing power of employees. It was thought that this would have a positive impact on prevailing economic conditions. This strategy is made clear in the preamble of the statute wherein Congress expressed certain "findings and policies," including:

> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.
>
> Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.
>
> The denial of employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce.

In view of these legislative findings, Congress clearly expressed its positive support for collective bargaining in the following provision:

> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by

> encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment, or other mutual aid or protection.[14]

For the first time in North America there was a definitive expression by a government that affirmed collective bargaining as good economic policy. The purpose of the new regulatory scheme was to equalize bargaining power between employees and employers through administrative mechanisms which would regularize representational issues and require the parties to bargain in good faith toward reaching a collective agreement. The goals of this exercise were to avoid unnecessary work stoppages over representational issues and ultimately to raise the spending power of workers.

Within a short period, the *Wagner Act* became a powerful instrument supporting the organizational drives of the American Federation of Labour and the Congress of Industrial Organizations. This experience gave impetus to Canadian affiliates of the same unions to pressure their governments to adopt similar legislation expressing the adoption of a positive public policy favouring collective bargaining for Canada. At its convention in 1938, the Trades and Labor Congress of Canada prepared a draft bill based on the *Wagner Act* and urged both federal and provincial governments to adopt it. A few provinces responded by passing statutes which contained some of the principles of the *Wagner Act* but left out its administrative mode of enforcement. In British Columbia, for example, the minister of labour exercised many of the functions that the National Labor Relations Board performed in the United States. In some cases these statutes merely set out a code of unfair practices prohibiting discrimination against employees for union activities and requiring the employer to bargain in good faith with the employee organization representing a majority of employees. However, these statutes were either declaratory or were enforceable only through criminal prosecution. The one exception to this mode of enforcement was the legislation in British Columbia which gave the minister of labour an important role in both the certification and bargaining process.

In 1939, J.S. Woodsworth, leader of the Co-operative Commonwealth Federation (CCF), introduced a bill in Parliament to amend the *Criminal Code* of Canada. This amendment (section 382) was adopted by Parliament and thereafter it was a criminal offence for an employer to discharge an employee wrongfully and without lawful authority for the sole reason that he was a member of a lawful trade union or to seek to compel an employee to abstain from belonging to such a union. In an earlier amendment to the *Criminal Code* in 1934, peaceful picketing had been declared exempt from criminal prosecution.[15]

By the start of World War II, while Canadian legislatures had declared the right of employees to bargain collectively free from employer discrimination or interference, there were no adequate mechanisms to ensure that the employer would negotiate in good faith with the trade union chosen by its employees. The federal government's jurisdiction over labour relations was extended due to its responsibility to conduct the war effort. Stimulated by examples in Ontario and British Columbia, Parliament took several tentative steps toward a comprehensive code of collective bargaining law. However, it was not until February 1944, and after continued labour unrest in Canada, that the federal government exercised its expanded authority over labour relations by enacting order-in-council *P.C. 1003*.

The war had brought critical labour shortages to Canada. Inflation was met with sweeping wage and price controls administered by the National War Labour Board. Wages were kept at 1925–29 levels. A flood of wartime directives froze employment in essential occupations by severely controlling an employer's rights to hire and fire and an employee's rights to quit or switch jobs. In this highly regulated economy, both industrial and craft unions, perhaps encouraged by successes in organizing workers by their affiliates in the United States as a result of the *Wagner Act*, attempted to spread unionism in every war-related industry. It was not an easy task. A bitter mid-winter strike in 1941–42 showed Kirkland Lake's gold miners how difficult it was under the *IDI Act* for their union to be recognized by the employer as their bargaining representative.

In 1943, with the outcome of the war no longer in serious doubt, union leaders were not content to abide by the rigid controls imposed on workers under the *War Measures Act*. In January 1943 the steelworkers struck for a 50 cent an hour wage increase. Other strikes followed and the labour scene started to resemble that of 1919, the year that set the record for industrial unrest in Canada. Mr. Justice C.P. McTague, chairman of the War Labour Board, reported to the prime minister that many of the strikes were not over wages or hours, but rather over the simple, basic right to organize. He recommended that Canada adopt its own version of the *Wagner Act*.

Prime Minister W.L. Mackenzie King was aware that many workers were deserting his Liberal party and joining the newly emerging CCF. In 1943, the Canadian Congress of Labour endorsed the CCF, which came close to winning a provincial election in Ontario. Reluctantly, the prime minister moved his party's economic philosophy to the left. In 1944, the Liberal party approved family allowances and promised universal health and hospital insurance and a postwar guarantee of full employment.[16] In February 1944, the cabinet approved *P.C. 1003*, the National War Labour Order. This comprehensive set of regulations was passed after an extensive public inquiry into labour relations had been carried out by the War

Labour Board and the provincial conference of ministers of labour had submitted their reports concerning the preferred model of collective bargaining legislation. *P.C. 1003* was to have more impact than any other source in influencing postwar legislation. Woods, appraised the significance of this order-in-council in these terms:

> Its very great importance comes from the fact that it was the first single document in Canadian policy development which combined and integrated into a programme of industrial-relations control, complete with administrative machinery, the American and Canadian approaches. And because of the vastly increased scope of federal policy during the war, it was truly a national system that had been established. Inevitably, it had to give way in the post-war period since its constitutional validity came to an end when the emergency passed. But it became the prototype both for its replacement, in the federal jurisdiction, and for most of the provincial acts that were passed to fill the gap left when the federal jurisdiction was contracted to normal peace-time dimensions.[17]

The Period 1944–48

The influence of the *Wagner Act* is apparent in the wartime regulations which provided a code of unfair labour practices, mechanisms for certification of bargaining agents, and the establishment of a tripartite wartime labour relations board to administer the law. The *IDI Act* influence is displayed in the measures that provided for a two-step conciliation process and a 14-day delay after the conciliation report was filed before a work stoppage could lawfully commence. A feature was added which again coincided with Canadian public policy to avoid work stoppages, particularly during wartime conditions. It became an offence to hold a strike or lockout during the term of the collective agreement. The parties were required to include in their collective agreement a process for disposing of grievances without resort to a work stoppage.

P.C. 1003 applied on its own terms to establishments subject to federal jurisdiction and to 14 classes of industries normally under provincial jurisdiction which were considered essential for the war effort. However, the provinces, except Saskatchewan and Quebec, suspended their legislation and made the regulations applicable to their jurisdictions. In this way, a national system of collective bargaining law was brought into existence. The 40-year process of articulating standards of behaviour for the industrial citizens and designing mechanisms for the enforcement of these norms had been completed.

Wartime economic conditions and regulatory policy favouring collective bargaining quickly bore fruit for the trade union movement. Union membership rose dramatically, doubling in size. Collective agreements were achieved without excessive resort to work stoppages that would have harmed the war effort and soured the governments' attitudes

toward the new collective bargaining regime. With the emergence of relatively stable union-management relationships, there was no turning back. The cooperation of the union movement was recognized by the governments as an important ingredient in maintaining a wartime economy that required high productivity. This temporary political and economic power of the union movement was translated into national public policy in *P.C. 1003*. The decision to extend the *War Measures Act* regulations for several years after the end of the war allowed the various governments time to plan peacetime labour relations policy. In addition, the country had the opportunity to experience, over the short term, the effects of a highly regulated collective bargaining system.

In late 1946 a conference of labour ministers was convened in Ottawa to discuss the development of peacetime labour policy. The ministers agreed to recommend adoption, as far as practicable, of uniform collective bargaining legislation by both levels of government. The federal government subsequently passed the *Industrial Relations and Dispute Investigation Act* in 1948. This statute applied in peacetime the essence of *P.C. 1003* and the consensus reached at the conference of labour ministers with respect to the principles to be enshrined in Canadian labour relations policy. Briefly summarized, Canadian industrial relations policy as outlined in postwar legislation was as follows:

- workers who met the statutory definition of employee had the right to join and form unions;
- these collective bargaining rights were protected by unfair labour practices legislation which prohibited acts by both employer and union that would discourage or interfere with the employee's prerogative to choose to bargain collectively;
- a system of defining appropriate bargaining units and certifying exclusive bargaining representatives was established;
- unions and employers were required to bargain in good faith; and
- these rights and obligations would be administered and enforced usually by a labour relations board, but in some cases in court.

This framework for collective bargaining was strongly influenced by the *Wagner Act*. However, Canadian legislators were even more concerned than their U.S. counterparts about securing the goal of industrial peace by means of state intervention designed to regulate industrial practices in order to avoid work stoppages. Consequently, Canadian labour legislation provided for:

- compulsory postponement of strikes and lockouts, coupled with compulsory mediation and/or conciliation procedures;
- prohibition of strikes or lockouts during the term of the collective agreement together with a requirement that each collective agreement

provide some alternative means for the resolution of disputes concerning the interpretation and application of the agreement; and
- leaving the content of the collective agreement largely to the parties to be determined according to their bargaining power.

However, Ottawa and the provinces increasingly began to require certain items to be included in collective agreements, such as a recognition clause, a no strike–no lockout clause, a clause providing for a peaceful mechanism to resolve disputes arising during the term of the agreement, and provision for a date of termination of the agreement.

Canadian Collective Bargaining

It is time to step back and analyze the direction in labour law policy in Canada that has been traced above. History reveals that Canadian law adopted three distinct attitudes toward collective bargaining.

In the 19th century, legal policy actively discouraged collective bargaining as offensive to the prevailing philosophy of economic individualism. Although companies were allowed to accumulate capital and thence to increase their power through widespread shareholdings, workers were denied the benefits of their collective bargaining power vis-à-vis the employer. A variety of legal obstacles to trade union activities were erected. At first these legal roadblocks took the form of statutory crimes, but subsequently the courts developed common law offences against union action. In addition, judges erected civil barriers to collective action by workers. However, slowly and painfully unions overcame these obstacles. At the turn of the 20th century, the legislatures had adopted a neutral stance toward collective bargaining. However, tort law, particularly as enforced through the device of injunctions from courts, still posed a deterrent to the spread of unionism.

In 1906, Parliament passed the *IDI Act* which sought to protect the public interest in avoiding wasteful work stoppages by forcing employers to bargain with unions with the assistance of a government conciliation board. A gentle nudge in favour of collective bargaining was inherent in this statutory initiative, but it was not enough to facilitate widespread growth in the trade union movement.

It was not until the 1940s that the prevailing economic policy in Canada swung toward a positive encouragement of collective bargaining. Not only did the new legislation enshrine the freedom of employees to join unions, it provided the facilities that positively nurtured the extension of collective bargaining to workers. For example, under the *IDI Act*, employers were legally required to deal with the union but only during the brief period of conciliation. If no collective agreement was reached during the conciliation process, the employer was under no further obligation to bargain with the union. On the contrary, the employer

could recognize another union as the representative of his employees or simply deal with his employees on an individual basis. In contrast, the Canadian labour law which developed in the 1940s placed a legal obligation on the employer to bargain in good faith and to make reasonable efforts to reach a collective agreement with the union that had been certified as the exclusive bargaining representative of its employees. Failure to fulfil this affirmative duty was an unfair labour practice, punishable by civil and criminal penalties.

Did the law have any influence on union activity? History records that in this favourable legal environment of the 1940s, trade union membership more than doubled within three years. The Canadian economy was launched in a direction where collective bargaining would play an increasingly important role in the labour market.

Without going into detail concerning the various statutory and judicial elaborations of Canadian labour law policy, it seems important to highlight some key features of our collective bargaining system in order to gain a perspective on the role of law in Canadian labour relations. Compared to the labour relations systems of other industrialized nations, ours is a highly legalistic system based on competing rights of the employer, the employee, the union and the general public. To participate in the process of setting wages and working conditions, employees have the right to associate in trade unions and the right to strike. Employees have freedom of speech in the context of timely peaceful picketing at their employer's place of business. Unions have the right to be independent of employer control or influence. Once a union has been certified, it enjoys the exclusive right to represent all employees in the bargaining unit, whether those employees are union members or not. Employers have the right to refuse union demands at the bargaining table.

This elaborate system of rights and freedoms is based on industrial relations norms which carve out acceptable limits to the rights of these competing interests. For example, the right of an employee to join a union is protected by limiting the right of an employer to discharge that employee for union activity. A union's right to organize employees is restricted by the employer's right to conduct his workplace efficiently. Labour law has set the bounds and provided the institutions to control the use of economic power in the labour market. Canadian labour policy thereby has substituted formal, legalized authority for the simple power equation in order to achieve an ordered liberty in industry. We have a highly managed system of collective bargaining, a system that appears to have more rules and regulations for peacetime than most other Western industrialized democracies have felt necessary to impose, even during times of national emergency. Compulsion is the touchstone — compulsory recognition and bargaining on the one hand, compulsory conciliation of disputes and work stoppages on the other.

The dominant aim in motivating the policy makers to fashion this legal system was to secure industrial peace. Each of the incremental steps along the road to the Canadian collective bargaining system which emerged in the 1940s was in response to some sort of industrial crisis, usually a strike. In each case, the public interest in continued production and the absence of economic conflict prompted the legislatures to adopt the policy of collective bargaining as a road to industrial peace. Some quick references to our history will illustrate this point:

- The strike on the Grand Trunk Railway in 1876–77 resulted in the *Breaches of Contract Act* of 1877, which attempted to ameliorate the conditions of workmen on the railways, and also made railway strikes illegal in almost all circumstances.
- Canadian Pacific Railway trackmen's strike of 1901 resulted in the *Railway Disputes Act* of 1903, which introduced the concept of tripartite conciliation boards with the power to investigate the dispute, compel testimony under oath, require production of documentary evidence, etc. By this act, non-traditional legal tribunals and instruments appeared on the industrial scene.
- The *Industrial Disputes Investigation Act* of 1907 was Parliament's response to the 1906 coal miners' strike in Lethbridge, railway strikes in Manitoba and a sawmill strike in Quebec. The significance of this act is discussed above.
- The post–World War II statutes at both the federal and provincial levels took their lead from wartime orders-in-council that had been passed with the express purpose of obtaining the full cooperation of the trade union movement for the war effort. Full, uninterrupted production was essential for the public interest. The collective bargaining model that emerged from these wartime regulations is heavily weighted with government intervention designed to avoid work stoppages.

The result of this evolution was a two-sided public policy that continued the dominant strategy of containing and controlling work stoppages but added the mechanisms which would nurture the spread of collective bargaining. One wonders whether the federal government fully appreciated the ramifications of adding this theme from the *Wagner Act* to its wartime labour policy. Unlike the preamble to the *Wagner Act*, there were no resounding pronouncements in the wartime order-in-council that proclaimed the virtues of collective bargaining as sound economic policy. In contrast, the *Wagner Act* preamble declares that, to achieve a balance of bargaining power between workers and employers and thereby to raise the wages and purchasing power of workers, it is the public policy of the United States to encourage collective bargaining. It was predicted that this would help bring an end to the business depression. It was not until 1972 that the *Canada Labour Code* incorporated similar language expressing that the intention of Parliament in the statute

was the "encouragement of collective bargaining as a means of achieving a just share of the fruits of progress to all."

There is no indication that the economic assumptions and policies enshrined in the *Wagner Act* were the motivating influences that shaped the labour law regime that evolved during World War II in Canada. On the contrary, the country was concerned with work stoppages rather than inflated wages, since wages were controlled by the War Labour Board. It appears that in an effort to get the full support of the newly emerging Canadian union movement for the war effort, the federal government agreed to add the mechanisms introduced in the *Wagner Act* which encouraged the growth of collective bargaining. Whether this decision was good peacetime economic and social policy was not fully explored at that time. Once the Canadian workers had the protection of this favourable legal environment for collective bargaining, unionism spread quickly and established firm roots.

The point must be stressed that the government was responding to pressure from Canadian affiliates of American unions to adapt an American labour law scheme to the Canadian context. The fact that this American collective bargaining model was designed at an earlier period to solve a different economic problem in another country was not fully examined. The adversarial model of collective bargaining that was designed to fulfil the needs of the American socio-economic scene became the labour relations public policy of Canada. The old philosophy of economic individualism was replaced by the new regime of collective bargaining, and once it was put in place there was no turning back for Canadian policy makers. The lesson of the history of the evolution of labour relations law is that it is easier to give rights than to take them away.

Early Collective Bargaining, 1948–75

Introduction

What would be the impact of the major labour law reform package undertaken during World War II with its unique national system of collective bargaining? Would a labour policy devised for wartime prove to be successful in peacetime conditions? Carrothers has observed that, when Canada adopted its heavily regulated industrial relations system, "the country was long on policy and comparatively short on experience in the management of competing rights and freedoms in the workplace."[18]

The period 1948–75 was rather uneventful in terms of fundamental changes to the national model of collective bargaining that emerged from the war. Although the national labour policy rested on the unstable foundations of divided political jurisdiction, the basic principles of *P.C.*

1003 survived the transformation from wartime expediency to peacetime policy. In the three decades following World War II, there were no significant amendments to federal private sector collective bargaining law. In the provincial jurisdiction there were some innovative statutory changes, particularly in Ontario, Quebec and British Columbia, but these were consistent with the principles embodied in the wartime labour policy. The major policy changes in Canadian collective bargaining law from 1945 to 1975 were in the nature of refining the *P.C. 1003* model in two key ways:

- by taking away from the courts the primary responsibility for the resolution of issues of economic conflict in labour relations; and
- by expanding the coverage of benefits of industrial citizenship to the public service, and professionals and other workers who had been excluded from collective bargaining in the postwar legislation.

Before I analyze the nature of these two changes, it seems appropriate to trace the impact during this period of the major initiative of collective bargaining law reform in *P.C. 1003*. As noted earlier, the dominant policy objective inherent in *P.C. 1003*, at least in the federal government's mind, was to avoid, control and contain work stoppages. Strikes over recognition issues would be avoided by providing a legal system based on the *Wagner Act* which involved compulsory recognition of and compulsory bargaining with the certified trade union. Work stoppages over the negotiation of new collective agreements would be avoided by government intervention in the bargaining process through two stages of conciliation. Work stoppages during the term of a collective agreement were prohibited, and compulsory grievance arbitration was used as a peaceful method of resolving mid-contract disputes. Whether the legislators favoured the spread of union density in the economy seemed incidental to the primary concern about avoiding work stoppages. Whether Canadian governments, like the American Congress that passed the *Wagner Act*, perceived that collective bargaining was a desirable device to raise workers' incomes and thus stimulate the economy is unclear.

Has this bold experiment in labour policy making lived up to the expectation of the governments? Predictably, the answer is yes and no.

Enfranchising Industrial Citizens

If one purpose of Canadian wartime collective bargaining law reform was to nurture the spread of unionization, the statistics on union density indicate that the legislators' hopes have been fulfilled. This is not to say that the growth in collective bargaining was solely the result of law reform.[19] However, as will be discussed in the section on the spread of collective bargaining, Canadian labour law has played an important role in the increase in union representation of workers.

The figures on union density in Canada show a dramatic rise in

unionization since the advent of the current model of Canadian collective bargaining law. The number of Canadians who belonged to unions doubled during the war to 724,000. By 1983 approximately 40 percent of non-agricultural Canadian workers were union members. Yet this figure does not represent a totally accurate picture of the significance of collective bargaining in Canada because many Canadian workers are covered by collective agreements despite the fact that they are not union members. In 1983, Labour Canada estimated that, in establishments of 20 or more workers, about 38 percent of "office employees" and 73 percent of "non-office and other employees" were covered by collective agreements, producing an overall total of approximately 58 percent of the Canadian work force covered by collective agreements.[20] The coverage is even higher in larger establishments.[21]

Unlike the United States, where trade union membership had declined by 1980 to under 21 percent of the work force, Canadian unions grew rapidly from 1961 to 1977, almost doubling in membership. During that boom period for union organizing, union membership increased at an annual rate of 6 percent, almost double the rate of growth of the work force as a whole. In international terms, union membership in Canada is far below Sweden (83 percent) and Austria (56 percent), slightly behind the United Kingdom and Italy and West Germany (42 percent) and above Japan (33 percent) and France. Almost all sizable blue collar units in Canada, accounting for approximately 70 percent of this part of the work force, had embraced collective bargaining by the end of the 1950s. In the white collar sector, the major organizational gains occurred in the 1960s and early 1970s as collective bargaining rights were extended to both the federal and provincial public service. Currently about 90 percent of the public sector, including public servants, employees in higher education, and hospital employees, are covered by collective agreements. The last remaining major component of the work force not currently unionized is private sector employees in the service industries, i.e., the banks, insurance companies, and retail and wholesale merchandizing businesses.

In summary, the labour law reform of the 1940s which extended collective bargaining rights and protection of these rights to Canadian workers has spawned a tremendous increase in unionization of the work force. With the extension of collective bargaining rights to the federal and provincial public service employees in the 1960s, and to most teachers and nurses in the early 1970s, unionism quickly spread from the predominantly blue collar and goods-producing industry base to embrace the white collar, public administration and service industry sectors of the economy.

Work Stoppages

The statistics in 1976, three decades after the end of World War II, on

person-days lost per year due to work stoppages seemed to indicate the blatant failure of a labour law regime loaded with mechanisms to avoid and control strikes and lockouts. In 1946 there was an explosion of pent-up wage demands stifled by the wartime wage control program. Strike figures increased ten fold from 1944 to 1946 to approximately 0.54 percent of total working time. However, this appeared to be an isolated bubble of strike activity, since the Canadian strike figures until the mid-1960s compared favourably with other Western industrialized nations with unionized work forces. From 1960 to 1964, for example, the ratio of days on strikes to total working days was 1 to 1,000. However, from the mid-1960s to mid-1970s these figures rose steadily, reaching a high point in 1974–76 when Canada experienced 1,000 strikes per year and over 10 million person-days lost per year due to work stoppages. The number of Canadian workers on strike in the mid-1970s increased four-fold from the early 1960s. The ratio of strike days to total working time was 5 to 1,000, the same figures experienced in 1946. All the legal mechanisms that had been inserted into Canadian collective bargaining law for the purpose of avoiding work stoppages seem to have been, by these measurements, unsuccessful.

Of course, this type of comparison of strike activity over time and place must be viewed with extreme caution. There are many causes for the rise or fall of strike activity that do not reflect the wisdom or utility of the legal system. Researchers have suggested several key factors that have contributed to the rising level of strike activity in Canada during the 1960s and 1970s. One commonly cited contributing factor is the rapid growth in union density during that period, the assumption being that organized workers protected by collective bargaining legislation against dismissal for engaging in lawful strikes will be more likely to participate in work stoppages. During this period of increasing unionization there was a deterioration in the quality and accuracy of information which negotiators needed in order to engage in an informed cost-benefit analysis of the wisdom of engaging in work stoppages in support of their bargaining position. The relatively decentralized nature of the collective bargaining process in Canada aggravates the problem of the lack of accurate bargaining information.

Perhaps the most influential factor explaining our strike figures is the character of the Canadian economy. Compared to many Western European industrialized countries, our economy is more open to foreign competition, more dominated by cyclically unstable industries, and more affected by the volatility of prices of raw materials. Each of these factors may contribute to a deterioration in the information that negotiators in labour-management require to cost their proposals and to protect themselves from future inflation and so forth. Some observers have concluded that, given these characteristics of Canada's economy, strike activity is not abnormally high.[22] The time lost due to strikes

appears to be less than the person-days lost through unemployment, absenteeism, or injuries and illnesses that are covered by workers' compensation legislation. The point of all this is not that we should be satisfied with our strike figures, but rather that we should not blame our legal system for our inability to match the relatively low strike figures in some Western European countries. Obviously our labour laws cannot be faulted for wide swings in world commodity prices.

It seems foolish, however, to throw up our hands and ignore our relatively poor strike record. Unlike unemployment, strikes usually represent a loss of work and production for which there is an effective demand in the economy. The law may be a useful device to alleviate some of the causes of strikes that we can control. For example, the law might require both sides to disclose information relevant to collective bargaining. What history does tell us is that, by the mid-1970s, the legal regime created after World War II obviously was unable to accomplish its primary goal, which was to avoid work stoppages.

The Impact on Wage Rates

The preamble of the *Wagner Act* trumpets the purpose of the statute, to equalize the bargaining power of workers and employers in the hope that workers' wages and purchasing power would increase. The economic strategy in this legislation addresses the inherent inequality in negotiating power between large employers and individual workers. The power of employers derives from their control over job opportunities. The individual employee either takes the wage offered by management or goes elsewhere to work. With unionization, bargaining employees speak with a collective voice. Skilled trade union representatives can match the knowledge and experience of the personnel manager in judging the appropriate value of the labour. The collective economic force of employees, with the threat of concerted withdrawal of their labour, is an effective bargaining lever in achieving the employees' assessment of the value of their work.

If this is the theory of collective bargaining as a labour market device, what have been the economic results of trade union representation in Canada? The current consensus seems to be that unions raise the remuneration of members relative to non-union members by 15 to 20 percent.[23] This differential varies depending on the state of the economy (inflation or recession), the nature of the employer's product market (competitive or protected), wages as a proportion of value added, and the degree and stage of unionization of employees in that industry.[24] These figures may understate the total effect of unionism on wage levels of workers since there is evidence that unionism also has direct effects on the wages of non-union establishments.[25]

Summary

It is difficult to determine what the expectations of the law reformers were when they fashioned the legal framework for collective bargaining. Clearly they wanted to diminish the time lost as a result of work stoppages and yet maintain the right to strike and lockout as a bargaining tool in the negotiation of new collective agreements. This strategy was successful until the late 1960s, but entirely unsuccessful in the mid-1970s. Whether governments wanted actively to encourage the spread of collective bargaining or not, the *Wagner Act* principles and mechanisms put in place during World War II in Canada were very successful, even more so than in the United States. If raising workers' wages and spending power was the goal of the new labour law policy, the evidence shows a 15 to 20 percent increase in unionized rates over non-union. These relatively modest figures do not support the claim often made by union organizers that collective bargaining would eliminate the "exploitation of labour by capital." Nor do these wage differential statistics indicate that collective bargaining has produced substantial equality of earnings among Canadians, either in the amount of income going to capital as opposed to labour or to the unionized as compared to non-unionized worker.[26]

In the face of experience with a full-scale system of collective bargaining over a 30-year period, the most significant impact of the legislation may not be economic advantage but rather the political and social benefits that this legal regime offers workers. These aspects will be discussed in more detail later. Suffice it to say at this point that the key benefit of the collective bargaining process is that employees are able to subject the employment relationship and the workplace to the "rule of law" as embodied in the collective agreement. Workers are able to participate in industrial self-government by making decisions in a democratic forum about matters that are extremely important to their lives. Instead of merely taking what is offered by their employers — even the most generous of employers — employees in the collective bargaining process take their destiny into their own hands.[27]

Having briefly outlined the major impact of the collective bargaining law that emerged from the wartime period, I wish to point out some other salient events that display the character of the legal regime in operation. As noted earlier, most legislative activity during this period was at the provincial level and consisted mainly in refining and modifying the principles of the *Wagner Act* as Canadians experienced the weaknesses or awkwardness of the legal rules or their administration. When put into operation, freedoms acquired in the legislation sometimes conflicted with freedoms beyond the industrial community. For example, the right to strike sometimes produced casualties among innocent third parties. In these situations, when public tolerance reached its limit, governments were not reluctant to act. Legal strikes became illegal as governments

passed back-to-work legislation that ended work stoppages, usually with some kind of binding arbitration mechanism as the means to resolve the dispute.

Starting with the national rail strike in 1950, a policy of ad hoc legislation terminating legal work stoppages became a regular feature of Canadian labour law and policy. From 1950 to 1982, 60 statutes were enacted to terminate disputes the government deemed a danger to the public interest. Almost all of these converted a lawful strike into an unlawful one or prohibited a strike that would have been lawful. Of the federal back-to-work statutes, 17 were in the transportation industry and 3 were in the postal service. Of the provincial statutes that ended bargaining strikes, 14 were in the education sector, 7 were in urban transportation, and 6 were in hospital and health services.[28] Clearly the public interest as reflected in existing collective bargaining legislation often gave way to the public interest in maintenance of services. The governments seemed ready to perform many roles in the industrial relations system, acting as a declarer of the public interest, a designer of the system, a vicarious administrator of the system, a manager of emergencies, the largest employer in the country, and the manager of the economy in matters of fiscal policy.[29]

As noted above, Canadian labour legislation which promotes the spread of collective bargaining also provides employees with the opportunity for self-government. Implicit in this exercise of self-regulation is the exercise of civil libertarian values such as freedom of conscience, assembly, speech and association. Yet these concepts are not easily defined nor did their exercise prove to be immune from government attack during this period. Legislation was enacted in one case to deprive a union of bargaining rights because one of its officers was a communist,[30] in another case because an officer was a convicted criminal,[31] and in another instance because the union in question was affiliated with a body in a foreign jurisdiction.[32] Governments passed statutes to prohibit political activity by a union regardless of the wishes of the majority of its members,[33] and to replace the elected officers of a union with government-appointed trustees.[34]

In each case, these instances of government intervention were criticized as a violation of workers' freedom to exercise their right of association. The legislators defended their intervention on the basis of safeguarding some higher community value. For example, the British Columbia statute barring political contributions by unions was defended as protecting the civil rights of members of the bargaining unit who did not support the party favoured by the majority.[35] As Arthurs points out, the real significance of these examples is that the legislators who were accused of infringing the collective bargaining rights of workers felt obliged to justify their intervention into the affairs of unions by appealing to higher principle.[36] Workers as industrial citizens had achieved certain

civil libertarian rights attached to self-government which could not be removed without some countervailing, compelling community interest. No longer was the exercise of the collective bargaining interests of workers being viewed simply in terms of the pursuit of private economic self-interest. Rather, trade union activity had taken on a social and political character. Yet this new dimension meant that union activity would compete with other societal values in the mosaic of the public interest.

The Reform of Collective Bargaining: Five Case Studies

The Movement from Courts to Administrative Tribunals

An important feature of the Canadian collective bargaining model that emerged in the 1940s was the granting of primary responsibility to enforce collective bargaining legislation to specialized administrative tribunals rather than to the regular courts. These institutional reforms respond to the traditional inability of judges to handle labour litigation in a manner that is sensitive to the special needs and traditions of the labour relations community. Under the new scheme, labour relations boards were to administer the collective bargaining statutes, while private, grievance arbitration boards would interpret and apply collective agreements. The courts were not totally removed from labour relations conflict, since they retained primary responsibility for developing the law of strikes and picketing and they continued to exercise supervisory responsibility over the administrative tribunals. One of the important developments of postwar labour law reform has been the gradual removal of the courts' involvement in these remaining areas of economic conflict.

There are several reasons for this legislative preference for non-judicial enforcement of collective bargaining law. Historically, workers have perceived the courts to be biased against collective bargaining. Judges had created the common law conspiracy crimes and torts against strike and picketing activities of workers. This alleged bias led to the virtual removal of the courts' jurisdiction to regulate picketing, both in England[37] and the United States.[38] The courts initially refused to enforce collective agreements as contracts, suggesting that the proper remedy for breach of a collective agreement was "not an action . . . but the calling of a strike."[39] The experience of the Ontario Labour Court, a branch of the Ontario High Court of Justice which in 1943–44 administered similar collective bargaining legislation, did not persuade the legislators that the courts were the ideal forum to handle collective bargaining law. Neither management nor labour were anxious to resort to the criminal law to regulate labour relations disputes.[40] What both sides preferred were administrative investigation and guidance rather than the use of courts of law and the imposition of punishment.

The explanation for various complaints about the courts in labour relations is that the judges seemed determined to apply the general jurisprudential concepts of the common law to the newly emerging industrial community. The legislatures recognized that the new rights and duties in collective bargaining law were created by statutes which in many instances reversed the common law. However, the creation of boards to administer the new law was not just a negative reaction to how the courts had interpreted labour law. There were positive virtues of the administrative approach to labour relations. What was needed was to bring new procedures, evidentiary rules and remedies to labour law adjudication. The preference for administrative tribunals was based on the need for a new industrial jurisprudence applying the legal regime of statutes, customs and contractual relations emanating from the world of labour relations.[41]

It is one thing to create a non-judicial tribunal charged with administering a collective bargaining statute, it is quite another to accomplish a truly administrative approach to labour disputes. While the labour boards were given the responsibility of handling certifications and unfair labour practices in the representation area, and the arbitrators were to interpret and apply collective agreements, the courts retained a supervisory jurisdiction over these inferior labour tribunals. The post–World War II period showed that the judges in exercising this supervisory function resisted the notion that labour-management relations as practised before labour relations tribunals operated in some "industrial Alsatia" immune from the prerogative writ of the court. Attempts by the labour boards to fashion new procedural and substantive rules were often quashed by the courts, who refused to evaluate the merits of the boards' innovations by using anything but the same common law yardsticks applied to inferior courts. In the face of such aggressive review, labour relations boards and judicial arbitration were forced to become more "court-like" in order to escape judicial censure. This change often impaired the labour boards' ability to function in a truly administrative manner in resolving labour disputes.[42]

The net result of these judicial incursions into the world of industrial relations was that Canadian labour boards became "judicialized." Lawyers were chosen to chair the panels. The materials they considered were properly recorded in a transcript taken at a hearing conducted by lawyers in accordance with the common law notions of natural justice. This pursuit of a tight legal system in labour relations exacted its price. The more law was injected into the process the more it cost in time and money and in the parties' loss of a sense of participation in the process.

Under the institutional division of labour in the Canadian collective bargaining system that emerged from the 1940s, the courts were given primary jurisdiction over the adjudication of strikes, lockouts and picketing disputes. There were virtually no statutory rules that were to be

applied to these disputes. Rather, the courts continued to develop both the substantive and remedial law of industrial conflict according to the common law tort doctrines. Many members of the industrial relations community perceived these doctrines as vague, awkward incursions into the real world of labour-management relations. Tort law decisions in picketing cases included declarations of "per se illegality," and lacked the inherent logic and industrial relations sense that would engender acceptability by the parties.

The parties complained that the courts had become overly concerned with reaching expedient results in order to end the immediate dispute. Most courts were exposed to heated labour disputes only through applications for interim injunctions. Typically an application for an interim injunction was made by an employer affected by a strike or picket line. The employer's lawyer would go before a superior court judge who happened to be assigned to weekly court. Ordinarily that judge would have no special experience in labour relations. The judge would hear the evidence, gathered on short notice by the employer's counsel, about the events surrounding the strike or the picket line. Usually the evidence was presented in written affidavits rather than oral testimony. The real facts behind these labour disputes were not canvassed in these proceedings. In addition, injunction proceedings were often conducted *ex parte*, i.e., without the union or its counsel even being present to submit its side of the case about whether a tort was being committed or whether the activity complained of should be restrained by an injunction. Thus, injunction procedures, which focus on the tight legal issues of irreparable harm and balance of convenience, were considered peremptory and unfair. The injunction process did not provide the courts with the opportunity to probe beyond the surface legal facts and to examine the underlying human dimensions of the dispute.

Carrothers has noted that the injunctive process was frequently utilized by some employers "not to protect a legal right, but to gain an economic advantage, not to put down lawlessness, but to bring a union to terms for a collective agreement."[43] By the late 1960s, Canadian workers, particularly in British Columbia and Quebec, perceiving the legal system to be not only remote but subject to the manipulation of the employers and thus biased against workers' interests, began to defy certain injunctive orders. The courts were losing their moral authority. Respect for the rule of the law in labour relations waned.

Eventually both the labour relations community and the general public became convinced that there had to be a better way. Informed opinion realized that the continued participation of judges in the resolution of industrial conflict using common law doctrines and *ex parte* injunctive procedures not only would hurt the reputation of the judges but would produce more harm than good in labour management relations.

Not surprisingly, the 1970s saw a gradual decline in the role of the

courts as the exclusive or even the primary forum to resolve economic disputes in labour relations. Legislatures created more tightly worded privative clauses to limit judicial review. Judges showed more self-restraint in second-guessing the procedures and substantive doctrines being developed by labour tribunals. *Ex parte* injunctive procedures were abolished in many jurisdictions. Parallel remedial jurisdiction over bargaining disputes was developed in labour relations boards which were given the authority to decide on the legality of strikes and lockouts and to issue cease and desist orders accordingly. In British Columbia, the legislature went further than all other Canadian jurisdictions in the extent to which it attempted to relieve the courts of the responsibility to resolve collective bargaining disputes. It is thus instructive to examine in some detail how well the new institutional structures in B.C. labour law have worked in order to assess whether these arrangements should be considered for implementation elsewhere.[44]

In the *Labour Code of British Columbia* the courts were deprived of virtually all remedial authority over industrial relations conflict, with the exception of violence on the picket line. The Labour Relations Board of British Columbia was assigned comprehensive jurisdiction across the entire sweep of labour law, including exclusive jurisdiction over economic industrial conflict. The common law doctrines which had comprised the legal regime applied by the court in the labour relations setting were replaced by a comprehensive statutory regulation of strikes, lockouts and picketing. Why? The B.C. legislators perceived that economic conflicts between workers and employers and between labour and capital, are political questions that require special rules in legislative form to achieve legitimacy and acceptability. The absentee management and sporadic exposure of the courts to labour disputes was thought to be ineffective in achieving the delicate balance of the competing interests of labour and management. The labour board would now deal with the entire life cycle of the collective bargaining relationship — from application for certification, unfair labour practices and bargaining disputes leading to work stoppages, to review of the process of mid-contract dispute settlement. The hope was that the labour board would see how the different pieces of the process could fit together, so that decisions about whether a unit was appropriate for bargaining would be made by a tribunal well acquainted with how strikes and pickets can proliferate under an unduly fragmented bargaining structure. Given this exposure to all aspects of the labour relations law, the expectation was that the board would be able to make the necessary strategic judgments about whether and how to intervene with the law.[45]

There are other positive reasons why the labour board was given exclusive jurisdiction over collective bargaining disputes. The Labour Relations Board was manned by people drawn from the industrial relations community. A few labour lawyers and labour law professors were

involved, but most of the staff was made up of non-legal personnel from management and unions. Members were selected carefully to represent all major constituencies of the labour relations community — the public and private sectors, blue collar and white collar workers, large and small employment settings. This community participation helped the board maintain a sense of practical reality and sensitivity in its decisions.

The institutional limitations of the judicial process, which relies on conventional adjudication within the adversary system, prevent the courts from achieving satisfactory resolutions to labour disputes. Although a court injunction order enforceable through contempt procedures may end the immediate work stoppage, it does not resolve the problems that produced the conflict.

Attacking the underlying sources of conflict and the hidden agendas involving human emotions is not required in a typical court case involving combatants who usually have no further relations. The purpose of a court proceeding is to produce a winner and a loser, but the special character of industrial conflict is that it takes place within the context of an ongoing relationship. Employees who go back to work pursuant to a court order do not forget the reason for their strike. If the underlying problems that produced the shutdown are not resolved, ill will toward management will fester and grow, and productivity may drop. Further work stoppages may easily occur.

In view of this continuing relationship, it is desirable to resolve disputes in such a way as to enhance this ongoing relationship. Adjudicated verdicts from some remote legal tribunal may result in loss of face by the losing party. In contrast, an informal settlement fashioned by the parties themselves may involve a workable compromise between the positions originally taken when the dispute began. These settlements tend to endure not only because they are voluntarily reached rather than imposed from on high, but also because they can prevent the application of abstract legal rules which may not be sensitive to the real life dimensions of the dispute.[46]

In summary, the institutional character of administrative tribunals, manned by labour relations experts, using mediation as the preferred dispute settlement technique and adjudication only as a last resort, allows labour relations boards the flexibility to promote the continued harmonious relationship of the parties. At the same time, the exposure of the Labour Board to the real industrial relations problems that produced the legal disputes helps the board in its adjudicative function to render judgments that make sense in labour relations terms.

The result of this extension of authority of the B.C. Labour Relations Board to include issues of economic conflict was to curtail the number of unnecessary and illegal work stoppages in the province, i.e., mid-contract wildcat strikes, walkouts over unfair labour practices and inter-union jurisdictional disputes. However, for the board's mediation process to work, both sides must be willing to participate actively in the

process and to look for practical compromises rather than legal victories. If either side boycotts the proceedings, or uses the process merely as a fact-finding device rather than as a vehicle to solve problems, it will only delay the inevitable adjudicative disposition of the dispute.

The major complaints about the board's attempt to mediate a dispute through the informal hearing is that third-party non-combatants are temporarily denied injunctive relief while the board attempts to solve the problem that produced the shutdown. If these third parties are truly innocent victims of the labour dispute, they should not be required to make sacrifices "in the vague hope that this will assist in ensuring long-term peace between the two combatants in the dispute."[47] The management community is now pressing the B.C. board to be more flexible in its approach to picketing cases. Rather than schedule an informal hearing in every case the board is being encouraged to use this device only in those cases where the question is truly likely to be solved by a quick, negotiated settlement. Apart from this exception, the labour-management community in British Columbia prefers the administrative approach to economic conflict and has no appetite for returning to the situation which existed before the *Labour Code* when the sole vehicle for third party assistance in ending a work stoppage was to seek injunctive relief from the regular courts.[48]

These institutional reforms involving an administrative approach to industrial conflict display some important features of the role of law in labour relations. The experience of the late 1960s, when unions started to defy back-to-work orders, indicates how fragile the rule of law is in industrial relations. Statutory directives, court orders and collective agreement obligations are not self-enforcing. When the unions in British Columbia became convinced that the courts were merely injunction mills, aligned with the employers in the economic battle with workers, voluntary compliance with the law was undercut. The majesty of the law would not guarantee compliance when the legal issue decided at the injunction application did not focus on the real problems between the parties and did not provide for a full hearing of the grievances by those affected by the order. Court orders may clarify rights and may be effective in telling people what not to do. But judicial edicts issued from on high are not so useful in influencing a positive response from people. In order to encourage the parties involved in an industrial dispute to resolve their differences, the process must be designed to be more participatory and more informal. If the legal system is to be used for the ambitious task of promoting a healthy bargaining relationship, then the system must be designed along voluntary and not legalistic lines. The more involved the parties are in fashioning the resolution of their dispute, the more likely that the disposition will be adhered to. This type of system places a heavier burden on the parties to exercise their rights as industrial citizens in a responsible manner.

In the turbulent world of B.C. labour relations, the Labour Relations

Board has repeatedly been highly successful at achieving settlements of potentially disastrous bargaining confrontations. The latest example of this success was in November 1983 in a dispute involving the provincial government and the public sector unions. In a province-wide dispute that was quickly escalating into a general strike, the Labour Relations Board played a key role in assisting the parties to reach accommodation. While various panels of the board operated 24 hours a day mediating and adjudicating unlawful strike and picketing applications, the chairman of the board was mediating the collective bargaining dispute between the government and its employees in another room in the board's building. Without the facilities of the board and the confidence and trust that both parties had in its expertise and even-handed treatment, no such peaceful resolution would have been reached. In the poisoned bargaining atmosphere of this public sector dispute, there had been real doubt about whether cease-and-desist orders from the board would be obeyed. The institutional fungibility of the board allowed it to use the gentler arts of mediation and accommodation to nudge the parties into a settlement rather than simply to rely on its adjudicative authority to issue orders in the hope that they might be obeyed. These events show how acute the contrast is between mechanisms available in the B.C. *Labour Code* and a legal system which can rely only on compulsion as the first and final mechanism to influence behaviour in industrial relations.

The Spread of Collective Bargaining

The Representation Vote

The remarkable increase since World War II in the number of Canadian workers represented by unions is an indication of the impact of the adoption into Canadian law of the *Wagner Act* mechanisms to protect the right to bargain collectively. As noted earlier, in establishments of 20 workers or more, approximately 38 percent of office workers and 73 percent of non–office workers, or about 58 percent of all workers, are now covered by collective agreements in Canada. If we include establishments of 20 or fewer workers, approximately 46 percent of all workers in Canada are covered by collective agreements. Close to 40 percent of non-agricultural workers in Canada are union members. These figures are in stark contrast to the United States where trade union membership had fallen to under 21 percent of the work force in 1980. Much of this organizational activity in Canada took place in the period from 1961 to 1975 when union membership increased by an annual rate of 6 percent.

How can we account for these figures? The growth was primarily attained as a result of the extension of the right to collective bargaining that was granted to public sector workers in Canada during this period. Union representation nearly tripled in the public administration sector

in Canada from 1962 to 1976, increasing from about 23 percent to 66 percent. However, there was a significant rise in union membership in parts of the U.S. public sector during the same period — primarily in the ranks of state, county and municipal employees, and in the education field.[49] Consequently, the divergent trends in overall union density between Canada and the United States must be explained by developments in the private sector.

The Canadian industrial relations setting closely resembles its U.S. counterpart not only in terms of its geographical and historical environment, but also in terms of the identities of the companies and unions in the system. Most of the unions operating in the private sector in Canada are "international unions" with American headquarters. Many of the major companies in Canada are subsidiaries of American firms. Both countries adopted a labour law system based on the *Wagner Act* which provides for employee freedom to bargain collectively. Legislation in both countries contains similar unfair labour practice prohibitions and remedies against interference with these rights. Both labour law regimes provide the services of an administrative agency to monitor the certification process. Yet the results of these two certification models in terms of number of workers organized is remarkably different.

A major part of the answer seems to be that the U.S. legal system provides for a protracted organization campaign culminating in a secret representation vote conducted by the National Labor Relations Board (NLRB). Even if the union can show clear evidence that it has signed up a vast majority of employees as members, the employer is not required to bargain with the union. Rather, the employer can insist that the NLRB conduct a secret representational vote after a certification campaign. This practice allows the employer to participate in the election campaign against the union in an effort to influence employees about the pros and cons of collective bargaining. The result of this practice has been described in these terms:

> The NLRA [*National Labor Relations Act*] gives an American employer ample time and opportunity to chill its employees' incipient impulse towards collective action. Because the payoff from illegal coercion is often so great in relation to the legal sanctions, the United States has experienced a swelling tide of discriminatory discharges and other illegal interference with the workers' right to engage in union activities. Peaceful arbitration under the NLRA, the course American unions are told to follow instead of engaging in economic self-help, has become almost a blind alley.[50]

The Canadian system has a subtle but crucial distinctive feature. Rather than encourage a certification election preceded by a lengthy campaign, Canadian law provides for certification based on the results of the union's organizational drive. With the exception of Nova Scotia and British Columbia, a union is certified when it presents signed authoriza-

tion cards from a majority of the employees as of the date of application for certification. In Nova Scotia and British Columbia, there is a quick representation vote, held immediately upon receipt of the union's application for certification. These votes are typically held within three or four days after receipt of the application by the board. Unions win about 80 percent of those votes, without becoming involved in pitched battles with employers.[51]

The assumption of the Canadian scheme is that the primary objective of the system is to provide a smooth administrative procedure that gets the parties to the negotiating table as soon as possible. The willingness of the employees to back the union during the bargaining process by going on strike is the test of whether the union achieved lasting support during the organizational drive. There is no need for a lengthy representational campaign, culminating in a secret vote conducted by the board, to ensure that employees were serious when they joined the union. The U.S. experience shows that the time required for a formal certification procedure gives the employer a strong temptation to use illegal coercion to influence employees to change their minds.[52]

There are other key characteristics in the U.S. labour law regime which have contributed to the decline in union density in the United States. A major difference between Canadian and American collective bargaining law is the relatively weak arsenal of remedial powers against violations of the obligation to bargain in good faith that are available to the National Labor Relations Board as compared to those available to Canadian labour tribunals. The lack of teeth in the NLRB remedial mechanisms contributes to the dramatic rise in unfair labour practices by employers since the 1950s. Thus, even if a union does win a certification election, its chances of achieving a first contract are only about three out of five. The high incidence of employer unfair labour practices in the first contract setting has prompted the call for amendments to American labour law to provide the NLRB with remedial devices such as first contract arbitration, make-whole orders, etc., which have become a common feature of the Canadian labour relations legal setting during the past decade.[53] This comparison of the Canadian and American certification procedures graphically illustrates how labour legislation or simply administrative practices can alter and have altered the results of union organizational efforts dramatically in the two countries.[54]

Collective Bargaining in the Public Service

The second major shift in labour law policy during the 1945–75 period was the extension of collective bargaining rights to the public sector during the late 1960s and early 1970s. When collective bargaining rights were granted to the private sector during the 1940s, public servants, along with domestics, agricultural workers and professionals, were excluded from coverage by the legislation.[55] The rationale for denying

these rights to public sector workers was that it would be inconsistent with the sovereignty of the Crown for these workers to bargain collectively. According to this theory, to require the government to bargain with a trade union representing its employees is incompatible with our principles of democracy. A fundamental tenet of this theory of democracy is the political equality of the individual and the accountability of the government to all of the people. If majority rule, as represented at the ballot box, is the essence of our system of government, the law should not allow special interest groups such as the police or hospital workers to bring collective strategic pressure on the elected representatives concerning the inherently political judgment of the allocation of the government's budget. Rather, these public employees should make their wishes felt at election time, not through the additional economic lever of union representation.[56]

This thesis of the incompatibility of public sector collective bargaining and the sovereignty of government remains the policy support for the type of collective representation available to the majority of U.S. public servants. For example, U.S. federal civil servants have the right to bargain about some items that affect their employment setting, but not about the key issues of wages and hours of work, which are unilaterally set each year by the president in tandem with Congress. At the same time, U.S. civil service unions do exert considerable influence over the rate of adjustment of their wages. As members of the Federal Employees Pay Council, the unions have direct input in the recommendations made to the president about pay adjustments for civil servants. The *Federal Pay Comparability Act* requires the government to adjust federal pay rates to keep them in line with rates paid in comparable jobs in the private sector. If the unions are dissatisfied with the presidential pay award, they can operate at the political level by lobbying Congress to override the president's decision and legislate a more generous increase.[57]

By the mid-1960s, Canadian public servants were unwilling to tolerate a take-it-or-leave-it type of bargaining relationship with the employer and increasingly demanded some meaningful role in setting the terms and conditions of their employment. The gains made by New York City teachers following a highly publicized strike in 1961 spurred public employees in Canada to abandon the consultation model of representation they had used since World War II. A huge arbitration award won by Ottawa nurses in 1968 heightened interest in collective bargaining among hospital workers throughout Ontario. The general climate of social change that characterized the 1960s, the civil rights movement, campus militance, and the anti–Vietnam War protests all contributed to the growing appetite among public sector workers for more control over their terms and conditions of employment.

The rapid political change in the Quiet Revolution in Quebec included

the extension of collective bargaining rights to Quebec's public sector workers in 1965. The impact of this breakthrough for Quebec public servants was felt throughout Canada. Employees of the federal government working in Quebec, who were involved in the politicization process sweeping the Quebec working class, intensified their own efforts to achieve similar collective bargaining rights from their employer. Astute political lobbying by federal employee organizations persuaded the newly elected Liberal government of Lester Pearson to introduce collective bargaining rights to the federal civil service. The *Public Service Staff Relations Act* was passed and became the touchstone for provincial public service collective bargaining law reform during the next decade.[58]

Collective bargaining had been enjoyed by quasi–public sector workers employed by municipalities and Crown corporations for decades. The obvious mechanism for public service workers to protect themselves from unfair and arbitrary treatment in their place of employment was through collective bargaining. The theory that the right of collective bargaining for public servants was incompatible with the sovereignty of the state was never disproved, rather it was simply overtaken by other political and social events and abandoned by the policy makers.

The focus of attention shifted to what precise shape collective bargaining should take. Unlike the situation in private sector collective bargaining, the various Canadian jurisdictions vary widely in collective bargaining legal systems that apply to public servants. Some jurisdictions have simply covered the public sector in labour law for general application, others have passed a special statute for certain government employees although along private sector lines. Some jurisdictions limit the items for which public sector unions may bargain, some have the right to strike, others provide for binding arbitration to resolve a bargaining impasse. The federal government, as well as the New Brunswick and B.C. governments, have given some of their public sector unions the choice of whether to strike or to seek arbitration as the means of resolving bargaining disputes.

What is evident in these developments is that when these changes occurred they did not attract much partisan debate. Most of these statutes were passed with all-party support. The principle that public sector employees should have rights to bargain collectively similar to those in the private sector seemed almost self-evident. The major debate was about the techniques that would be available to the public sector to resolve impasses. The key issue is whether public sector bargaining is subject to the same competitive market discipline as the private sector. The debate continues almost 20 years later.

No attempt will be made here to catalogue the various arguments that have been offered on both sides of this debate. The important thing for the purpose of this paper is to assess the significance and impact of the decision to extend the right to bargain collectively to such a sizable

portion of the work force. What is particularly noteworthy about this dramatic spread of collective bargaining to the public sector is that the policy makers were most concerned about prohibiting or controlling work stoppages in the public service. The focus of the law was to provide the mechanisms that would try to fit the public sector into the model of free collective bargaining that had operated successfully in the private sector for more than 20 years. For example, if the right to strike was to be curtailed, how could the dynamics of the collective bargaining process be duplicated? What would be the downside risk in going to arbitration to settle a new collective agreement? Canadian labour policy's preoccupation with controlling the use of economic weapons through legal mechanisms was again the focus of attention rather than the impact that collective bargaining would have on labour-management relations or the public purse.

The experience with collective bargaining in the public service over the last 15 years has caused most governments to doubt the wisdom of the decision to grant the rights of industrial citizenship to this sector of an economy. Conventional wisdom, especially among many economists, is that the government and its employees do not resemble the private sector because they are immune from the discipline of the market. The impact of a work stoppage on a public sector worker in the form of lost wages is similar to the impact on his private sector counterpart. The major difference between the two sectors is the special nature of the public employer. Whereas in the private sector, the costs of agreeing or disagreeing with union demands are assessed in terms of how labour costs or continued production will affect the employer's competitive position and market share, these pressures do not exist to the same degree in the public sector where the service provided may be monopolized by the government. Moreover, the impact of a public sector work stoppage is more likely to be felt by the public, which is denied a service not readily available from another source. The costs of agreeing or disagreeing with public sector union demands are more affected by political concerns. Bargaining is thus a more politicized process, with both sides more likely to use the media to present their cases directly to the public. As a result of these factors, public consciousness of the details of the dispute and the public's frustration with the inconvenience caused by a denial of services tends to be far higher than for most private sector bargaining disputes.

While these characteristics of public sector bargaining do not seem to have been anticipated and considered when collective bargaining rights were extended to the public sector, the negative effects of this law reform became painfully acute in the mid-1970s. During this period Canada experienced a relatively high level of inflation as a result of the confluence of two primary sources: a rapid rise in the cost of imported energy and food, and high wage settlements, many of which occurred in

the private sector. The combination of these two inflationary influences produced a rate of inflation that the federal government decided was unacceptable in the Canadian economy. Consequently, in October 1975 Parliament moved to enact sweeping wage and price control legislation. Although it is inaccurate and unfair to blame the system of public sector bargaining alone for the rate of inflation in Canada, it seems that public sector unions have never regained the public's favour since the tumultuous years of labour unrest in the mid-1970s.[59] When the control period ended in 1978, there were many calls for some kind of permanent wage control mechanisms for public sector workers. The next section will briefly trace the events which led to controls and assess the validity of these calls to turn back the clock to the days before public sector collective bargaining.

The Anti-Inflation Act, *1975–78*

The special significance of this period for this study is that it represents the first time in this century that the federal government in peacetime moved to deny previously won collective bargaining rights to Canadian workers, except for isolated examples when the government had passed legislation to end strikes, as noted above. The imposition of wage and price controls by law illustrates the government's lack of confidence in the process and results of the collective bargaining system as it was then operating. More specifically, the *Anti-Inflation Act* reflected the federal government's concern that the wage-setting mechanisms then at work in the Canadian collective bargaining system would not react quickly enough to work in tandem with fiscal and monetary policy in order to reduce the rate of wage and price increases. What were the factors that caused the federal government to pass wage and price controls and the provincial governments to agree to similar restraints on their public service?

During the period 1968–72, the rate of private sector compensation exceeded that of the public sector. Yet the inflation rate in Canada exceeded 10 percent in 1973 and the increase in private sector earnings lagged by nearly 6 percent. From 1971 to 1973, labour's share of the gross national income dropped from 75 to 69 percent. These trends produced a concerted drive by Canadian workers for wage increases to recoup their lost purchasing power, culminating in the 20 percent average annual increases gained by workers in mid-1975. No longer was inflation solely the product of international currents of supply and demand. It was now being fed by the inflationary expectations of the domestic actors in the Canadian economy. While the wage push was led initially by private sector unions, during the period 1973–76 the rate of wage increases won by public sector unions exceeded that achieved by the private sector.

These inflationary wage increases attained by the public sector unions

in 1975 fanned public sentiment in favour of permanent wage controls for public sector workers. In my opinion, the experience in the mid-1970s was a special historical case that does not support the view that full collective bargaining rights should be denied to public sector employees. A number of factors contributed to the large public sector increases of 1975. First, public sector bargaining was a new experience for both governments and unions. Employees had great expectations of their union leaders, particularly since they were falling behind the private sector. The public was leery about possible shutdown in services that had never been subject to a strike. Consequently there was popular support for early settlements at any cost without regard to long-term economic impact. Second, during the same time frame, there was a dramatic increase in government revenues from a growing economy. Unsophisticated negotiators on the government side seemed to live under the illusion that they were cutting up an ever-expanding revenue pie. In addition, the management structure in the public sector was characterized by a bewildering fragmentation of authority in the management hierarchy, with responsibility generally divided or shared and formal responsibility often differing from actual responsibility. Moreover, public sector funding arrangements under which employers received funding from a number of sources, each seeking to influence the way the money was spent, complicated the collective bargaining effort of management. The confluence of these influences produced the inflationary settlements of the mid-1970s.

I am persuaded that these conditions are not inherent, congenital defects of the system but rather are signs of adolescence, the growing pains of collective bargaining between governments and their employees. No doubt these developments would also have taken place in the private sector when new bargaining relationships were formed.[60] It takes time for the parties to get to know each other, to probe their relative strengths and weaknesses, identify their key areas of concern, and work out the frame of reference within which their adversarial relationship will be conducted. However, once these parameters are set, once the parties have worked together over a sufficient period of time, the relationship matures and realistic, competitive settlements are reached more easily. It should not be surprising that the public sector wage increases fell behind those in the private sector during the late 1970s and early 1980s.

The key factors that contributed to the inflationary wage settlements and unenviable strike record of the mid-1970s in Canada were double-digit inflation and, in its first year, the federal wage control program. The effect of these circumstances was to destroy the necessary comparisons which negotiators need to set the contract limits of new collective agreements. Traditional wage relativities — the so-called pecking orders in the economy — were disguised by the huge settlements

reached in various public and private bargaining relationships. As labour's share of the gross national income fell in the early 1970s, union leaders were hard pressed to deliver a wage settlement that would protect their members against rapidly rising inflation. Often this led to strikes if the employer balked at his rising labour costs, particularly if he could not easily pass them on to his customers in the form of higher prices.

The *Anti-Inflation Act* aggravated the picture in its initial year of operation. The control program did not freeze wages but rather set a yearly base wage increase percentage (e.g., 10 percent in 1975), with variations on these increases to take into account factors such as historical relationships with other bargaining units which had settled prior to the enactment of the program. During the first year of the program, administration of these wage guidelines seemed erratic. For example, the Anti-Inflation Board (AIB) allowed wage increases of 17 percent in the pulp industry of British Columbia on the basis of a historical relationship with the forest industry which had settled only days before the *Anti-Inflation Act* was proclaimed. The same increase was denied to Alcan smelter workers in Kitimat, despite the fact that its wage structure had always been based on the agreement with the other main employer in that town, the Eurocan pulp mill. A senseless work stoppage protesting this decision was the unfortunate aftermath.

In these circumstances, aggravated when decisions from the AIB were sparsely worded and delayed, negotiators during 1975 lost sight of the limits of reasonable settlements, and strikes were inevitable. However, after the turbulent first year of the *Anti-Inflation Act*, the pecking order was restored, settlements uniformly matched the maximum allowable increase in the control program and work stoppage figures plummeted as employees refused to go to the wall for non-monetary items in their agreements.

The significance of the anti-inflation period for purposes of an understanding of the role of law in labour relations can be assessed from several angles. The dominant concern of Canadian labour law policy during this century has been to avoid or control work stoppages, and the focus has been on the bargaining process, in particular the cost to the public if the parties do not agree. Canadian labour law sought to control the organization and bargaining process while allowing the parties to exercise free choice concerning the contents of their agreement. The *Anti-Inflation Act* represented a radical departure in policy since it was directed not at what happens when negotiations fail, but at what happens when they succeed. What is the acceptable price that we can pay for labour peace? The reaction of the law was to regulate directly the key item in the collective agreement, which is the compensation package. Government policy now directly challenged the concepts of free collective bargaining and self-government by the parties concerning the terms and conditions of employment.

I would not argue that as a matter of principle the government should have left employers and unions alone and let the marketplace determine the level of compensation increases and the resultant impact on the Canadian monetary system. For several years, the federal government had attempted to influence the parties to exercise some voluntary restraints on wage increases and prices. Only when these attempts proved futile did the federal government use compulsory controls.

It is interesting to point out that Japan experienced a much higher rate of inflation after the 1973 oil shock. This dramatic increase in the cost of living in Japan was also reflected in wage increases in the 30 to 35 percent range across its unionized sector. Yet there was no government intervention into the Japanese collective bargaining process. There were no wage and price controls imposed. The lines of communication between government, big business and labour were strengthened, not severed, as they collaborated on what needed to be done to maintain industrial peace. Within two years Japan's economy was back to normal. What a contrast to the mess that followed the unilateral intervention of the Canadian government into the collective bargaining system.[61]

When the *Anti-Inflation Act* was enacted, both labour and management opposed it and continued their opposition and/or calls for an early end to the controls until they expired in 1978. One significant fallout of the program was the withdrawal of the Canadian Labour Congress (CLC) from the rudimentary form of consultation in which it had previously been engaged with the government. Lines of communication established between government and labour through institutions such as the Economic Council of Canada were extinguished and have only recently been rekindled.

While the *Anti-Inflation Act* did not meet its stated objectives, the AIB program did exert an important restraining influence on the Canadian inflation rate. So much of the Canadian economy is affected by international commodity prices, foreign exchange rates and other external influences on our price levels that a domestic legal program cannot by itself control the cost of living in this country. Recent econometric studies have concluded that in the absence of any foreign-induced price shocks, the AIB would likely have lowered the actual Canadian inflation rate to 5 percent, close to its 4 percent target.[62] Economists agree that the AIB reduced the rate of wage inflation by approximately 2.5 to 4 percent per annum. Nor was there any outburst of wage inflation when controls were lifted in 1978. The fact that wages seem to have been controlled more easily than prices does not necessarily mean that the control program was inequitable. A better gauge appears to be how the program distributed the burden of restraint across the entire spectrum of domestic income of Canadians, i.e., including the earnings of both union and non-union employees, professional fees, rents, dividends, profits of big or small business, and capital gains. On this scale, it appears that unionized workers did relatively well compared to professionals, super-

visory staff, and middle management. Why? Because the program was explicitly redistributive in the sense that it put a maximum cap of $2,400 on annual increases in personal income. However, one has to ask whether an anti-inflation program is the proper vehicle to attack the degree of income differentials in our economy.[63]

Although the program did lower the negotiating target or contract zone in the collective bargaining sphere, this result was achieved only after a great shock to the collective bargaining system. During the first year of controls, 1976, Canada finally surpassed Italy by having the highest person-days lost through strikes in the Western industrialized world. Perhaps this hemorrhaging in the system was inevitable since massive income controls were a novel peacetime experience, and it took time for the parties to understand and adjust to the program. The exclusion of deferred compensation from the scope of the program, whereby all wage gains negotiated prior to the imposition of controls were immune, caused a great deal of the trouble since it created huge wage disparities for comparable groups of employees.[64] The program attempted to avoid these wage disparities by allowing for exceptions to the statutory wage ceilings on the basis of an "historical relationship." However, this concept proved to be too vague to give adequate guidance to negotiators in the real world of Canadian industrial relations.

As Canada moved from the second to the third year of the anti-inflation program, the guidelines as interpreted by the administrators became clearer and the labour unrest, at least as displayed in work stoppages, dropped dramatically. But the memories of the turmoil in labour relations from the mid-1970s did not subside. The wage hysteria in contract settlements in 1974–75 and the industrial chaos in 1975–76 which culminated in the National Day of Protest and earned Canada the reputation as the nation with the worst strike record in the Western industrialized world, caused many people to call for a full-scale rethinking of our collective bargaining system. Sweeping changes were called for. These ranged from the denial of the right to strike and/or wage controls for the public sector, to co-determination, tripartism, or quality-of-working-life programs as alternatives to our adversarial model of collective bargaining. Arthurs summed up the sentiment at that time:

> Wage levels, we all know, have been constrained by the government's anti-inflation program. One can concede that the program was adopted and administered unfairly and insensitively, or insist that it was the best that could be done in response to the national crisis of inflation. One can predict that the AIB will be abolished outright within the foreseeable future, or one can foresee a post-controls, transitional period. But one cannot seriously imagine that we will return forever to the golden age of pre-control innocence. We have eaten the fruit of knowledge and left the garden of free collective bargaining. Things will never be the same again.
>
> We are clearly moving in the long run to some kind of national incomes policy. . . .[65]

This feeling of gloom about the viability of our collective bargaining system has subsided. The call for wholesale changes to the system was replaced by piecemeal legal efforts to cure some of the tangible flaws in the existing model.[66] Worries about a post-control inflationary wage bubble proved unfounded. The collective bargaining system survived and functioned reasonably well. But when the second oil shock of the decade started the inflationary spiral in 1979 which culminated in the deep recession of 1982–83, the major legacy of the turmoil of the mid-1970s became clear. Although Canadian governments would allow the private sector to engage in collective bargaining relatively free from government regulation, no such leeway would be given public sector workers. They would be subjected to legislated wage restraints, either in the form of a wage freeze or wage guidelines, with the right to strike either extinguished or the incentive to strike removed.

In summary, the impact of the *Anti-Inflation Act* has been quite profound on the Canadian industrial relations system.[67] One suspects that the legacy of the act could not have been anticipated by the federal government in October 1975. Would the government that enacted collective bargaining legislation in the hope of maintaining industrial peace have imposed the guidelines with the knowledge that it would cause the industrial relations havoc of 1975–76?

One unfortunate legacy of the program is that it generated a breakdown in the lines of communication and consultation that had existed between the federal government and the CLC. While the calls for tripartism rang out as a response to the labour relations chaos in 1975, the structure in which this dialogue could have been conducted was severed. Indeed the CLC spearheaded a constitutional challenge to the program which resulted in a reaffirmation by the Supreme Court of the limited role of Parliament in creating a national industrial relations policy. The Supreme Court was willing to uphold the federal *Anti-Inflation Act* only as a response to an "emergency" or "crisis."[68] The majority of judges firmly indicated that Ottawa would have no such legal authority if controls were to become an enduring or even a periodic feature of our economic landscape. So, while Ottawa won the immediate constitutional battle in the case, it lost the crucial jurisdictional war. The ironical aftermath of all these legal wrangles was that the CLC's victory in this case effectively barred the federal government from directing a national industrial relations strategy. Yet for many years the CLC had sought a form of tripartite consultation with the government and business leaders that would shape such a national policy. Both sides appeared to lose the case.

The biggest loser may be the model of free collective bargaining that had emerged from World War II. In the future, frontal attacks on the system in the form of wage control legislation might prove hard to resist. The sense of responsibility and autonomy that the industrial citizens in our collective bargaining system enjoyed for 30 years had now been

undermined. Big business and big labour were made aware that they no longer operate in a private world of self-government. Public values would take precedence over private values in the economy. Collective bargaining would now be more consciously integrated by government regulation into the wider system of social policies.

Mid-Contract Dispute Resolution

Thus far this study has concentrated on the development of public law in the collective bargaining system, i.e., the statutory and common law components of labour law. To understand the role of law in labour relations, it is also important to analyze private contractual law and the mechanisms developed to enforce this law. It is in this area that most workers are directly affected by law, not only in its application to them as employees covered by contractual benefits and obligations, but also in their participation in the democratic rule-making process and the private judicial process. In short, the exercise of self-government is experienced most directly by workers in their participation in the negotiation and application of the collective agreement. This exercise of participatory democracy may be the most important virtue of the collective bargaining process in our society. An understanding of the extent to which the law has contributed to this participation in the process of self-rule provides useful lessons on the use of law as an instrument of social policy.

As mentioned earlier, the Canadian collective bargaining model is unique to the extent that it prohibits mid-contract work stoppages and requires grievance arbitration, or other peaceful methods, to resolve mid-contract disputes concerning the interpretation and application of the collective agreement.

Why would arbitration be selected as the alternative to the use of economic power as a means of enforcing one's interpretation of an agreement? The labour relations community rejected other forms of adjudication such as that practised in the courts because it was believed that arbitration had the advantage of being speedy, informal and inexpensive. Procedural informality and the lack of legalistic jargon in the arbitration process allowed the parties to participate fully in their private dispute resolution process. Employees were frustrated and intimidated by formal judicial proceedings, whereas at arbitration, a worker could tell his own story in his own way to a labour adjudicator who was familiar with the law of the shop and the problems of that industry. The full participation of the parties in this informal process contributed to the carthartic value of arbitration. Whatever the outcome of the case, the grievor had the satisfaction of speaking his mind and having the arbitrator and his employer listen to his story.

Grievance arbitration has existed as the primary forum of labour dispute resolution since the 1940s. By the 1970s the ideal model of

arbitration — a cheap, quick and easy-going forum — had become a thing of the past in many bargaining relationships. The time taken to resolve grievances left the parties dissatisfied, confused and frustrated, regardless of whether they won or lost the case. One commentator summed up the litany of complaints about arbitration in these terms:

> The formal negotiations and grievance arbitration processes no longer are the effective "problem solving" and flexible instruments that scholars of an earlier generation believed them to be. Grievance arbitration is unduly legalistic, slow, cumbersome, expensive, and conservative. It is less a vehicle for developing a "common law of the shop," and adjusting the contract to fit unexpected circumstances, than a procedure for transferring income from workers and their employers to arbitrators and labour lawyers.[69]

There is no doubt that there has been a tremendous growth in the number of labour lawyers and arbitrators in Canada in the last decade. Yet there is no sinister conspiracy of lawyers and arbitrators to snatch the arbitration process away from the industrial relations community. It is unfair to blame lawyers for causing the arbitration system to fall into disrepute.

The arbitration process is no different from the court system in the sense that both are awash in a sea of litigation. Perhaps this is partly because too much is asked of the arbitration process. Tasks are now assigned to an arbitrator that the parties and the community should be able to solve in other ways. For example, discipline problems such as absenteeism, alcoholism and aggression, which may be rooted in alienation from work, are adjudicated under the amorphous phrase "just cause." Job security claims, which are a function of demographic, educational, environmental, technological and economic forces, have recently been issues in the majority of arbitrations.[70]

Collective agreements have become more complex and comprehensive; the labour-management relationship has increasingly become the object of public law regulation. Consequently the parties now seek arbitrators who have broad experience and expertise in a variety of legal regimes. Thus, the favoured arbitrators are lawyers with skills which are in great demand and who may command correspondingly big fees. For decades, arbitration awards have been recorded in specialized report series, have spawned major texts on the law of the collective agreement and have attracted frequent media attention. With so much riding on the outcome of a case, one side feels the need for outside assistance and hires a lawyer. Not to be outgunned, the other party follows suit. The result of these trends is that grievance arbitration has become a highly professionalized and specialized form of litigation.

The object of going to arbitration is to win, and the side that is unhappy with the arbitrator's reasons may seek recourse through judicial review. Canadian judges operate under a legalistic, formal conception of how the arbitration process is supposed to operate, and they have been quick to

impose their views on arbitrators who have strayed from this model. Consequently, arbitrators have become increasingly reluctant to conduct the type of free-wheeling hearings that characterized the early days of grievance arbitration, and many innovative attempts by arbitrators to provide workable solutions to industrial relations problems died on the cross of judicial intervention.

The result of the confluence of these various streams of developments was that the virtues of arbitration, which in theory qualified it as the preferred system of dispute resolution, were no longer exhibited in operation. By the early 1970s, the industrial relations community, disillusioned with the reality of grievance arbitration, was anxious for significant legislative reform to assuage the desire in some quarters for work stoppages to enforce contract rights.

The legislatures have responded to these calls by implementing various measures to preserve and promote the grievance arbitration process as a realistic alternative to wildcat strikes. Some jurisdictions simply reworded privative clauses to limit judicial review. The British Columbia government took the major step of providing a comprehensive statutory framework for grievance arbitration in Part VI of the *Labour Code*.

The most important ingredients of the B.C. *Labour Code*'s reform of the grievance arbitration process were the statutory mandate and remedial authority to be exercised by arbitrators and the role of the Labour Relations Board in the grievance resolution process.

In many respects, the B.C. *Labour Code* simply reversed earlier decisions of the Supreme Court of Canada that had imposed a truncated version of grievance arbitration on the parties. No longer were arbitrators viewed as simply the official readers of the contract. Rather, they were viewed as important instruments of a public policy designed to avoid mid-contract strikes. For this reason the statute provided them with all the remedial authority to make final and binding awards.

The Labour Relations Board became involved in the grievance process in two ways. First, the board replaced the court as the primary vehicle for reviewing arbitration awards. To date, the board has shown restraint in its exercise of its review authority. It has avoided the urge to substitute its own views about the proper interpretation of the facts, contractual terms, and the common law of the collective agreement. Awards are vacated only when there has been a denial of a fair hearing or when the arbitrator has acted in a manner inconsistent with the provisions of the *Labour Code*. As a consequence, the arbitration process in British Columbia has become far less formal and the fact-finding process has become much more thorough than in arbitrations conducted in other jurisdictions.[71]

Yet the conventional arbitration process in British Columbia as well as the rest of Canada still does not provide the speedy, inexpensive relief that was believed possible when the legislatures commended it to the

parties as an alternative to mid-contract work stoppages. Conventional arbitration is not necessary for many mid-contract disputes that do not involve significant legal issues of interpretation. Many grievances involve only one grievor and simple issues of fact. Conventional arbitration is a legal overkill for these types of disputes. For this reason, the B.C. *Labour Code* and the *Ontario Labour Relations Act* assist the parties by providing the services of an industrial relations officer who attempts to resolve grievances by mediation or investigation.[72]

In grievance mediation, the officer listens to both sides of the dispute and attempts to fashion a settlement. If the parties cannot agree, then the process of investigation is initiated. The officer sends a report to the Labour Relations Board, which may seek further written submissions from the parties before it issues a binding decision, usually without a hearing. If, in the board's opinion, the grievance involves significant issues of law then the dispute is referred to conventional private arbitration.

The advantages of these mechanisms are twofold: first, they do not need the legal expertise of lawyers and thus the parties play the dominant role in resolving their own dispute; and second, because the process is quick and free of charge, many grievances which otherwise would never go to arbitration because of their relative insignificance to the rest of the bargaining unit and the prohibitive cost of arbitration, are now disposed of rather than simply dropped or left to fester a resentful, alienated worker. The net result is that the public policy of providing a viable alternative to mid-contract work stoppages is considerably enhanced, at very little cost to the public purse.

Where the parties do not wish the government to be involved in resolving their grievances, private grievance mediation and/or expedited arbitration procedures have been developed as alternatives to conventional arbitration. The advantage of these schemes is that the third party neutrals, who usually are named in the agreement, are made available on short notice and become intimately familiar with the industry and personalities of the bargaining relationship. In these circumstances, acting as expedited arbitrators, they can be expected to dispense justice with dispatch, on the premises, with short reasons but no loss in wisdom. As grievance mediators, they can open up new avenues of communication that may not have been explored by the parties during the grievance procedure. They can suggest alternative bases for settlement that may not have been canvassed. At the very least they can provide the grievors with a forum to voice their complaints in front of their bosses and a neutral party, even if there has been no violation of the agreement.

The touchstone of these alternative methods of dispute resolution is that they involve the direct participation of the people who must live with the outcome. In the formal adjudication process, whether in court or in conventional arbitration, the parties often feel alienated because of

abstract legal rules or the procedures involved, or because lawyers decide and conduct the cases. With these informal techniques the parties control the process, the hearing often takes place right at the premises, and the outcome is known almost immediately. All these factors contribute to the recognition that, if the parties are involved and committed to the process, it will work for their mutual benefit. This is responsible industrial citizenship in action.

Moreover, the process is conducted at a small fraction of the cost and time that is now the norm in conventional grievance arbitration. In the case of grievance mediation, the statistics show a remarkable 80 to 90 percent settlement rate in avoiding the final step of conventional adjudication. A significant benefit of this process is that the parties who become accustomed to settling their grievances with the assistance of a mediator, often develop a certain frame of mind, a readiness to compromise, which can be carried over into other joint union-management committees dealing with safety, job evaluation, productivity, redundancy and technological change. In short, the process of grievance mediation may make a positive contribution to the parties' overall goals.[73]

What lessons can be learned about the role of law from these developments in the mid-contract dispute resolution area of collective bargaining? Labour and management, like other democratic governments over the last 30 years, have become prolific lawmakers in the sense that their collective agreements now may run into several hundred pages of clauses describing the rights and obligations operating in the workplace. To accommodate the demands that this flood of law placed on their private judicial system, the parties — sometimes with the assistance of government-sponsored mediation or investigation services, or simply the provision by government of monetary subsidies for private mediation specialists — have developed new techniques for dispute resolution that commend themselves to other areas of our legal system similarily awash in lengthy, expensive litigation. The key to the success of these new dispute resolution systems is that the parties sincerely want them to work.

At the crest of this new wave of dispute resolution is the process of grievance mediation. The dynamic essential for its effective operation is the mutual recognition that in most cases it is better to reach an acceptable compromise than to produce a winner or loser through binding adjudication. This appeal to voluntarism rather than compulsion has met with unequivocal success in dispensing with grievances that otherwise would choke the conventional arbitration process. The success of the law in this area is based on its ability to build on the mutual recognition of the parties that a harmonious continuing relationship is more important than winning a particular skirmish, and that their common interests are more important than their individual interests.

We can contrast the success of these forms of legal intervention in the collective bargaining system with the effects of the *Anti-Inflation Act*. In the grievance dispute resolution area, the law was used to build from within the system. It sought to enhance the long-term relational goals of the parties by encouraging compromising attitudes and by recognizing mutual interests. The law highlighted the virtues of the collective bargaining system and promoted responsible industrial citizenship. These legal reforms have achieved remarkable success.

In comparison, the *Anti-Inflation Act* looks like a massive frontal attack on the collective bargaining system of the day. It denied the essence of the system, which was freedom to contract collectively and the right to self-government in the workplace. The program relied more on compulsion rather than on voluntary adherence to national economic policy. The parties were not involved in proposing the goals of the statute or in designing the mechanisms for administering the program. When looked at from this perspective, the *Anti-Inflation Act* displayed the government's complete lack of confidence in the ability of the parties to act as responsible industrial citizens. True to this perception, the parties reacted with no regard to their mutual interests nor to the public interest. During the first year of the program, Canadians endured the worst record of industrial unrest in our history. Surely there is a lesson in the dynamics and strategy of labour law reform that can be learned from these contrasting experiences, which coincidentally both occurred during the mid- to late 1970s.[74]

The Process of Labour Law Reform

An important consideration in understanding the role of law in labour relations is the extent to which the process of law reform has a bearing on the degree of voluntary compliance that is attainable. Laws are not self-executing; rather, they describe goals that the private or public lawmakers want to achieve. In the area of labour-management relations, where so many potentially conflicting individual and group interests abound, the attainment of legal goals depends upon a positive approach to the legislation by all those who are to be governed by it. The lessons of the history of labour law reform show that the process used to produce the law has a powerful influence on the willingness of the parties to subscribe to its dictates. Good lawmaking requires consideration of when and how the law should be developed quite apart from the relative merits of the substance.

With respect to the mode of law reform, the president of the B.C. Business Council, James Matkin, offered the following advice:

> where significant group rights are in issue in a democratic society it is imperative to develop a strategy of participatory reform. Even well founded

> attempts to regulate the balance of economic power in collective bargaining law may be rendered ineffective and unsuccessful by a unilateral process of reform, rather than by any lack of merit in the reform itself.[75]

The experience of labour law reform in British Columbia illustrates the wisdom of Mr. Matkin's observation. British Columbia's *Essential Service Dispute Act* (*ESDA*) represents the culmination of ten years of sporadic, disjointed attention by the legislature to the issues of work stoppages in essential services.[76] The content of the legislation includes an impressive array of mechanisms to avoid or control work stoppages. There are provisions for cooling-off periods, an essential service advisory commission, as well as the availability of fact-finding processes, and final offer selection and statutory guidelines for arbitrators to be used in conventional interest arbitration. Yet the incremental process by which this statute was developed totally alienated the trade union movement from using these devices to resolve essential service disputes. The policy of the B.C. Federation of Labour is that its affiliate unions should boycott any proceedings under the act.

How did this unhappy state of affairs come about? The first version of essential service legislation introduced in British Columbia was the *Mediation Commission Act* (*MCA*) of 1968.[77] Under the terms of this statute the Mediation Commission would conduct hearings into labour disputes determined by the cabinet to be contrary to the "public interest and welfare." The commission would then make binding decisions as to the terms and conditions of the new collective agreement.

Quite apart from the merits of the sweeping changes in the collective bargaining system contemplated in the statute, the government introduced it into the legislature without any warning or consultation with the labour movement. Not surprisingly, the trade union movement mounted an immediate campaign to condemn the bill and its "punitive anti-labour, Nazi, Fascist" policies. The Federation of Labour organized a protest march on the legislature, created a "Defeat Bill 33" fund, and ultimately boycotted hearings before the commission and defied its orders. Ultimately, the failure of the *MCA* contributed to the defeat of the Social Credit government in the 1972 provincial election. The important point of this experience for our purposes is that the government, by failing to consult with the union movement about the details of its legislative agenda, alienated the unions and lost their support.

Unfortunately, this lesson was not taken to heart by subsequent New Democratic Party and Social Credit governments in the development of later versions of essential service dispute legislation. When the *Labour Code* was enacted in 1974 there was no standing specialized legislation to deal with work stoppages. Health service, police and fire-fighter unions were given the option of seeking arbitration or else going on strike to break a bargaining impasse.

In August 1974, the fire fighters in the lower mainland of British Columbia went on strike and refused to perform any fire-fighting duties. The government was forced to call the legislature back from summer recess and passed the *Essential Services Continuation Act* which ordered the firemen back to work and forced them into a new bargaining structure consisting of a council of trade unions. In addition, the bill amended the *Labour Code* by authorizing the cabinet to impose a 21-day cooling-off period during which strikes and lockouts were prohibited.[78] This ad hoc legislative response to the dispute was considered to be unfair since it changed the rules in the middle of the game. Yet the government was to use this same crude legislative tool in the next four years to end disputes in the hospital industry, provincial railways, ferries and education system, as well as a major province-wide shutdown in the forest, food and trucking industry. On each occasion a new ingredient in the arsenal of remedies to avoid the harmful effects of the denial of essential services during a work stoppage was added to the legislation. For example, the Labour Relations Board was given power to designate services, facilities and employees as essential and order them to perform these services during a strike to avoid "immediate and serious danger to life, health or safety." Ninety-day cooling-off periods could be ordered by cabinet when additional mediation and fact-finding help were provided.

The problem with each of these pieces of legislation lay not in the merits of the particular device introduced but rather in the fact that each of these mechanisms was included in a back-to-work order in a hot political situation. In these circumstances, the labour movement perceived the law as being a reprisal against the labour movement and against the targetted union for a bargaining stance taken in a particular dispute. Consequently, when the *ESDA* was introduced in its final form after the ferry strike in 1977, the head of the Federation of Labour referred to it as a "two-bit" bill, and vowed to lead the labour movement in a "secret fight" against it. At their convention a month after the bill became law, B.C. Federation of Labour delegates unanimously approved a resolution to defy the legislation.

The history of the *ESDA* illustrates that an ad hoc, crisis-oriented approach to developing a legislative scheme to deal with essential service disputes is sure to fail. Both the NDP and Social Credit governments succeeded in alienating to a large extent the parties who are covered by the statute. This alienation is largely a product of the failure by the government, away from the shadow of a bargaining dispute, to consult with the parties and to elicit ideas and recommendations about how to avoid economic warfare in essential services. I believe that if the government had involved the parties in a dispassionate law reform process that investigated the needs and problems of both sides to essential service disputes and allowed them to review the various options and offer suggestions about how they could best be implemented, the legislative

package would have passed with bilateral support or at least acquiescence. By incorporating these ideas into the ill-timed, highly politicized process of ad hoc back-to-work legislation, these dispute resolution mechanisms were doomed.

The process of evolution of the essential service legislation of British Columbia is only one example of the need for consultation with the parties concerning the design of the legislation to which they are subjected. The introduction of the *Anti-Inflation Act* in 1975–76 and the recent public sector restraint bills of 1983 in British Columbia show the same failure by government to engage in a participatory law reform process with labour and management and the predictable alienation of the people that the law is trying to influence.[79] The all-time strike record of 1976 culminating in the National Day of Protest, and the near province-wide general strike in British Columbia in November 1983 can both be viewed as a direct, defiant response by the union movement to the government's unilateral process of labour law reform.

On what basis can the process of law reform used by the government be criticized? Would the unions have opposed these measures in any event? In British Columbia there is a stark contrast during this same period in the reaction of the labour movement to the introduction of the Labour Code in 1974 and the reaction to the *ESDA*. Similarly, in 1972 and 1978 there were amendments to the *Canada Labour Code* and, in 1981, amendments to the *Ontario Labour Relations Act*. In each of these instances, the changes to collective bargaining law were controversial and received significant publicity. But they did not cause the violent reaction that greeted the essential service and "government downsizing" legislation in British Columbia, and the federal government's anti-inflation legislation.

What was the recipe for law reform in these more successful examples? In each case the legislation was the subject of considerable discussion and study before it was introduced. Moreover, the reforms were not considered to be political or one-sided. They were part of a package of proposals that included some attractive measures responding to the needs and concerns of both labour and management.

The B.C. *Labour Code* is a good case in point. This complex and sweeping revision of the province's labour law was the product of a year-long informal commission of inquiry composed of three neutrals. These "three wise men," as they were dubbed by the media, set up an office, held meetings throughout the province, solicited briefs from all interested parties, and travelled across Canada to compare relevant experiences in other jurisdictions. Through this process the government was able to display genuine sensitivity to the interests of the entire industrial relations community. Significant improvements to the previous labour legislation were incorporated into the new code. The unions' interests were recognized in the code's explicit endorsement of the value of

collective bargaining as the means through which employees could participate in the affairs of the workplace and the legal mechanisms incorporated into the code to facilitate collective bargaining. The employers' concerns about labour peace, unnecessary work stoppages in multi-bargaining unit industries, and secondary picketing were also addressed. The NDP government resisted the demands of its primary political supporters in the union movement that the new labour law should be fashioned through a closed dialogue between the government and labour and that the code should tilt the balance in favour of workers' collective power.

When the final product of this process was unveiled, the code's curative, voluntary, administrative approach to labour relations was accepted by both sides. A key ingredient contributing to the positive attitude to the code by both management and labour was that they were kept informed and were consulted as the ideas in the code evolved. There were few surprises in the legislation when it was introduced. Since there were improvements for both sides, the code was not perceived to be one-sided. Nor were the selections of the personnel to serve on the new powerful Labour Relations Board perceived to be partisan or political.

The amendment process used for the *Canada Labour Code* and *Ontario Labour Relations Act* displays the same characteristics. The 1972 *Canada Labour Code* reflects the recommendations of the Woods Task Force studies and reports of the late 1960s. The amendments in 1978 had been debated and sifted through the standing labour-management committee of the House of Commons. The Ontario amendments included something for both management and labour. The employers wanted a new provision that would require management's last offer to be put to a vote before employees could lawfully strike. The unions received some union security protections in first contract negotiations. In each case, the legislative reforms were perceived to be directed at solving industrial relations problems rather than paying off political debts by tilting the balance in favour of the government's favoured voter constituency.

Such an approach is necessary in order to maintain the voluntary support of the powerful interest groups that the law is designed to elicit. The former chairman of the B.C. Labour Relations Board emphasized the need for this approach as follows:

> If the process of labour law reform is perceived to be one-sided and unfair, this will have a corrosive effect on the legitimacy of the law it produces; on the degree of voluntary acceptance for that law by those whom we are trying to control with it. I cannot over-emphasize the importance of this simple point. Labour-management relations involves powerful organized bodies on each side of the table, engaged in a sharp adversarial struggle about the division of the economic pie. The law aims to establish standards and institutions which will minimize the harmful impact of such conflict and, hopefully, will promote creative and cooperative problem-solving. But the

> Labour Board which is responsible for enforcing these basic rules of the fray has remarkably little naked power with which to coerce a recalcitrant party. The Board must ultimately rely on a shared sense that everyone needs such a Code even if this means grudging acquiescence in decisions which one loses. As long as the spirit of voluntary compliance is widespread in both the employer and trade union communities, the Board can deal effectively with the occasional defiant part. But if one side is convinced that the law by which it is governed is thoroughly unfair because of the manner in which it was produced, it will not provide tacit support to the Board in the enforcement of the law in these trouble cases. The example can spread. Guerilla warfare may become more the rule than the exception.[80]

The Role of Law in Labour Relations

Successful Legal Strategies

I will not attempt to summarize the various sections in this paper, but there are some important observations about the role of law in our labour relations system that should be highlighted. Having identified these, I will attempt to draw some conclusions about what we can expect from the law as a tool to solve our labour relations problems.

The Canadian system is heavily regulated through an elaborate maze of contractual, legislative and common law rules, perhaps more regulated than any other industrialized nation. What impact has the law had in this system? I have provided considerable detail to illustrate how statutory labour law reform has played a key role in the creation of the collective bargaining system that emerged from World War II. Prior to this period in our history, the law had been initially antagonistic and then neutral to collective bargaining. With the adoption of the principles of the *Wagner Act* into Canadian law in the 1940s, Canadian workers were able to use this favourable legal climate to exercise their choice as to whether they wanted to bargain collectively. The statistics illustrate that our affirmative legal policy toward collective bargaining nurtured a remarkable rise in trade union representation in Canada. Refinements on the original concepts of the *Wagner Act* and administrative practices in Canadian jurisdictions have resulted in completely different trends in Canada and the United States in union density, incidents of unfair labour practices by employers during union organization campaigns, and in first contract negotiations.

An important strategy in the success of the Canadian legal policy in this area is that the law does not rely solely on legal sanctions or prohibitions to deter unlawful behaviour. Rather than use a policy of compulsion, the law attempts to take away the incentive to engage in unfair labour practices. Why would an employer attempt to intimidate or coerce his employees so that they do not exercise their right to engage in collective bargaining when the labour relations board has already con-

ducted the representation vote, or counted the union cards within days of the application for certification? When the board has the remedial authority to grant a certification application without a vote if there is evidence of unfair labour practices by the employer that has destroyed the possibility of determining the real wishes of employees, an employer would be foolish to mount an illegal campaign against the organizational drive. Similarly, if the board has the remedial power to impose a first contract on the parties or to grant make-whole orders, this authority removes the incentive that the parties might have to refuse to bargain in good faith. Again the strategy is not one of crude deterrence but rather of finessing the conceivable gains from engaging in illegal behaviour. In comparison to the American setting, the statistics show that this sophisticated Canadian labour law policy has been highly successful in meeting its goals.

The public interest that prompted most legislative action in Canadian collective bargaining law has been to control or avoid work stoppages. Canadian law provides for a variety of mechanisms to assist the parties in bargaining. It seeks to delay the use of economic weapons, to prohibit work stoppages during the term of collective agreements, to require the parties to develop peaceful means of interpreting and applying collective agreements, and so forth. Although this array of legal mechanisms seemed to operate effectively until the mid-1960s, the last 15 years have shown a disturbing record of person-hours lost through work stoppages. From these crude statistics, it appears that this element of labour law policy has failed. Since Canadian law has attempted just about every known legal device to avoid work stoppages, one might conclude that the law cannot make people agree. Perhaps an inclination to engage in economic warfare is simply the price we must pay for having a system that gives Canadians the freedom to bargain for their own terms and conditions of employment. However, our historic perspective may be too narrow when we wring our hands about work stoppages. If, as some commentators believe, the strike figures of the 1970s were the result of the muscle-flexing of OPEC and the immaturity of the public sector bargaining relationship, perhaps we should allow the system to operate in other less volatile conditions before we attempt new forays into law reform designed to restrain self-government by labour and management.

The lesson of recent history shows that attempts by governments to attack the essence of collective bargaining systems through legal prohibitions will be met with stiff opposition. Labour laws are not self-enforcing. In a sense, voluntary compliance with labour laws must be earned. The process of the labour law reform is of critical importance if support of the parties for the successful implementation of the law is desired. In particular, when the law attempts to limit collective bargaining rights previously enjoyed, both management and labour should participate in the planning and design of the new legal regime.

The process of participatory democracy in the development of labour relations law is consistent with a major theme in our model of collective bargaining. The opportunity for management and labour to engage in self-government concerning the terms and conditions of employment is perhaps the greatest virtue of that system. Recent efforts to change the nature of the mechanisms for dispute resolution in the collective bargaining sphere have concentrated on this aspect of our labour relations system with considerable success. For example, the shift from courts to labour relations boards as the forum to resolve economic conflict is based on the assumption that an administrative agency has the institutional flexibility to assist the parties to settle disputes that occur during representation campaigns or at the bargaining stage. Similarly, the recent success of expedited arbitration and grievance mediation can be attributed to the increased involvement of the parties in the design and operation of their private dispute resolution process. Government intervention in the process by providing mediation services and/or monetary subsidies for the costs of operating these schemes has been a much more successful legal strategy than a policy which relies solely on erecting prohibitions against mid-contract work stoppages enforced by court injunctions. A legal policy that is directed at assisting the parties to reach voluntary settlements rather than at producing winners and losers at adjudication is more consistent with the needs of their ongoing relationship.

Labour Law and Technological Change

These examples of successful applications of labour law reform provide useful clues about the potential use of law in solving the key issues of labour relations in the remaining years of this century. Of major concern to Canadians is the need to modernize our economy to keep in step with the high tech revolution and remain competitive in world markets. In this respect, the strategy of labour law reform should be consistent with the internal energy of self-government that characterizes our collective bargaining system. Rather than impose inflexible legal standards, labour and management should be encouraged to design their own methods of dealing with technological change. Providing incentives and mediation assistance so that the parties can make the necessary changes within their collective agreements is preferable to contract provisions imposed by statute which cannot take into account the uniqueness of different industries and the personalities of the bargaining relationships.[81]

An important task of government would be to assist in developing an informal dialogue in the industrial relations community about technological change. The recently announced creation of the Canadian Labour Market and Productivity Centre, funded by government but operated by management and labour, is a step in the right direction.

Government policy based on encouragement rather than coercion, on the recognition that the industrial relations community is populated by responsible industrial citizens rather than unruly malcontents, seems more conducive to implementing the benefits of technological change with the least disruption. Rather than pass more laws to deal with technological change, governments can influence behaviour in a positive way in the labour relations community by adopting responsible, sensitive labour relations strategies to deal with their own employees. Government can lead best by example.

From the experience of other industrialized countries, it appears that an important ingredient in a formula to provide a peaceful means of implementing technological change, and controlling inflation, is the recognition by government that the labour movement should play an important role in the development of national economic strategy. In April 1983 the Australians held a successful National Economic Summit Conference for representatives of labour, management and the federal government in the House of Commons. The purpose of the conference was to create a climate for common understanding of the scale and scope of Australia's economic crisis, to explore policy options and to ensure that the whole community appreciated the roles they would have to play in coping with the crisis. A broadly based agreement was reached among the three groups on some important aspects of economic policy, including an agreed basis for a prices and incomes policy. Machinery was established to put the work of the economic summit on a permanent basis. For example, an economic planning advisory council was established, with representatives from government, business labour unions, farmers and community groups to advise on economic developments and provide a forum for community consultation on national economic and social strategies. In addition, the parties at the economic summit agreed to establish a surveillance mechanism to assess pricing decisions made by the strategic price setters in both the public and private sectors. Perhaps the most significant general achievement of the economic summit was to create wider public understanding of the gravity of Australia's economic situation and the restraints and sacrifices which would have to be accepted if Australians were to work together to overcome their difficulties.[82] Early returns show that the economic summit has had significant symbolic value in influencing compromising attitudes in labour relations at the grass roots level.

In Japan, a similar, although less dramatic, high level tripartite consultation has been carried on for decades on a regular monthly basis between the cabinet, the employers' associations, and the federations of unions. Plant unions and management also meet daily on issues involving technological change, productivity, health and safety, quality control and so forth. These joint consultation mechanisms have eased the rapid transformation of Japanese industry to world leadership in technological

advances and sophisticated management of the work force. This success can be attributed at least partially to the recognition by unions and managements that they are partners in the enterprise. The constant goal of these consultation mechanisms is to achieve their common interests without ignoring their adversarial roles.[83]

The important feature of these examples of successful consultative structures is that the governments of those countries have relied less on legal intervention and more on leadership and consultation to influence behaviour in the industrial relations community. Labour and management have responded in a positive manner to these government initiatives.

I am convinced that the area of greatest need for law reform in the Canadian collective bargaining system is in the private law, the law of the collective agreement. To meet the challenges of an increasingly competitive marketplace, we need to change awkwardly worded seniority clauses, rigid job classifications, and other contractual provisions that make it difficult to adapt to new technology, to retrain and redeploy workers in different jobs. There is a need to move toward more flexible wage systems in collective agreements so that these wage-setting mechanisms can react more quickly to changes in productivity, profitability and shifting inflation rates. To achieve this private law reform there must be increased awareness of the dimensions of the problems and the options available. The parties must recognize that their common interests will be enhanced if they can work out mutually acceptable solutions, even where these solutions require giving up what has previously been jealously guarded as "managements' residual rights," or a worker's quasi-proprietary right to a job based on seniority. In short, the parties must move from a defensive posture, wherein their relationship is characterized by rigid contractual rights, to a more positive, flexible relationship built on responsibility, trust and respect. If unions and employers do not make steady progress on their own in this direction, they will simply force the government to make further incursions into what is left of our system of free collective bargaining.

In the short term, our governments should restrain themselves from attempting to introduce more legislation. More effort should be expended on improving the industrial relations climate than tilting the bargaining advantage in favour of one side or the other.[84]

Constitutional Law and Labour Relations

In the *Snider* case, the Privy Council decided that under the division of powers in Canadian federalism the primary responsibility for legislation in collective bargaining is held by the provincial governments. Critics of this allocation of responsibility claimed that it made no sense in the age of multinational companies and unions for the regulation of labour

relations to be conducted by regional governments. Not only would they be powerless to control the General Motors and United Auto Workers of the world but this structure undermines the ability of the central government to develop national economic policy.

The events of the past 20 years have silenced many of the opponents of our current division of power over collective bargaining. The virtue of provincial responsibility over labour relations and federal diversity in employment has been the opportunity for the 11 governments to experiment with innovative refinements to the fairly uniform model of collective bargaining law that emerged from the 1940s. Each legislature has responded to the particular characteristics of its industries, the different complexion of its work force and its trade union allegiance, and the nature of its political spectrum. In effect, we have 11 different labour law laboratories, each experimenting with various blends of devices to regulate the collective bargaining system. If the experiment proves successful, it can be adopted in other jurisdictions. If the legal device fails to meet its objectives, it can be scrapped without unduly damaging the national social fabric. Labour law policy that is appropriate for British Columbia or Quebec need not be imposed on Nova Scotia or Alberta. The net result of this diversity has been some useful cross-fertilization between the provinces which constantly monitor the legislative and jurisprudential innovations of their neighbours.

With the inclusion of the Charter of Rights and Freedoms in the Canadian Constitution, the regional diversity of collective bargaining law may be curtailed. Although it was not obvious from the wording of the Charter that it would be relevant to collective bargaining, it has already had significant legal impact on labour relations policy. For example, the recent decisions by the Ontario Divisional Court in *Broadway Manor Nursing Home*,[85] and by the British Columbia Court of Appeal in *Dolphin Delivery Ltd.*,[86] have explored the issue of whether the Charter's protection of freedom of association and expression prohibits legislative or common law restrictions on the capacity of workers to bargain collectively, to strike, and to engage in peaceful picketing. We can expect a distinct increase in rights consciousness as judges are asked to decide the constitutional validity of union security provisions, wage control legislation, privative clauses that limit judicial review, exclusions of certain employees from collective bargaining legislation, affirmative action programs, and other ingredients of legal policy in the labour relations sphere. These decisions will result in a dramatic increase in judicial involvement in the development of labour law policy.

These developments, of course, represent a substantial departure from the course of labour law reform in the past 20 years. As discussed above, the successful process of labour relations law reform has involved the parties in the planning and design of the system. Participatory democracy is the desired strategy if one hopes to achieve

voluntary compliance. Law reform initiatives packaged with some attractive features for both sides have a greater chance of achieving the positive support from the community. Legal directives emanating from the judicial branch of government do not carry the same type of legitimacy because the rules and the rule makers are not drawn from the labour relations community.

It is to be hoped that judges will be cautious about upsetting current labour policy and sensitive to the unique context of labour relations law. The worst situation would be if abstract democratic concepts that operate comfortably in the general community are imposed on the labour relations community where they make no practical sense in industrial relations terms. The ironic feature of the Charter is that the constitutional authority to regulate national labour relations policy that was denied to the federal government as a result of the *Snider* case has now been handed to another central institution, the Supreme Court of Canada. It would be unfortunate if the inherently undemocratic process of judicial decision making were to impose a constitutional straitjacket on the development of labour law policy at the regional level. Canadians would lose the recently identified virtue of our diversified federal system of labour relations law.

The Value of Collective Bargaining

Throughout this paper I have been describing and analyzing the role that law has played in our collective bargaining system. My thesis is that the law operates most effectively when it enhances the opportunities for the parties to exercise their rights of self-government as responsible industrial citizens. Of course, the larger issue is whether the whole institution of collective bargaining is good public policy. If we are unsure about the answer to this question, why are we expending so much effort trying to make it work? It is not the function of this paper to discuss this larger issue in any detail. But I would like to offer some concluding remarks about the value of collective bargaining because any analysis of collective bargaining law should be conducted with a clear understanding of what the institution means for our society.

The traditional defence of collective bargaining is that it introduces a form of democratic participation by workers in designing the rule of law that affects them most directly, i.e., the terms and conditions of their employment. Commentators refer to this impact of collective bargaining as the "union voice effect." The involvement of workers in this process of self-rule enhances their dignity as people and as such entitles the institution of collective bargaining to positive encouragement from the law. If Canadians believe that self-determination and self-discipline are important values, then they cannot be neutral about the type of economic democracy that collective bargaining promotes in the workplace.

Collective bargaining is thus intrinsically valuable as an exercise of self-government. Rather than simply accepting what the employer offers, workers take their destiny into their own hands, decide what conditions they want and then actively pursue those objectives, with all the risks that this may entail.[87]

Although economists have recognized the positive value of the "union voice effect," they have traditionally posed two significant theoretical objections to collective bargaining. The first objection is that unions act as a cartel in the economy, controlling the supply of labour in order to raise wages to levels that exceed what they would normally be in a competitive labour market. This "monopoly wage effect" of unionism establishes an artificially high price for unionized workers which results in misallocations of capital and labour in both the unionized and non-union sectors of the economy. The net result of this process is to decrease productive capacity and thus reduce the total wealth and income generated in the economy.[88]

The second objection to collective bargaining focusses on the distributive consequences of unionism. The concern here flows from the recognition that the wage gains achieved by unionized workers are a function of their power in the labour market, rather than their current income, needs or productivity. A wage-setting mechanism based solely on market power may have harmful effects on less powerful segments of the work force. These less fortunate workers may suffer a decline in the real value of their earnings if the higher wages for the more powerful segments of the work force come out of their pockets rather than from capital's share of the economic pie.[89]

These two traditional objections to collective bargaining now seem to be largely unfounded. Collective bargaining can be defended on empirically verifiable economic grounds.[90] Recent econometric research indicates that employees who work under collective agreements may be more productive than workers in non-union settings.[91] The wages and standardizing thrust of collective bargaining tends to reduce inequality in income distribution within the plant, within similar industries, across the labour market and between racial groups.[92] These egalitarian effects seem to outweigh any incremental inequality that might stem from the union–non-union wage differential.[93]

In summary, collective bargaining has provided workers with the opportunity to engage in a democratic process within which they can speak with a collective voice about the features of their jobs that are of greatest concern to them. In addition, collective bargaining has resulted in a more egalitarian distribution of income in our society. In view of the benefits that this institution has provided to our society, legislators and judges who are responsible for charting the future course of labour law reform should be looking for ways to preserve and improve rather than dismantle our system of collective bargaining.

Notes

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1. A.W.R. Carrothers, "Making Collective Bargaining Work" (1984) unpublished manuscript.
2. *Master and Servant Act*, C.S.U.C. 1859, c. 75 repealed by S.C. 1877, c. 35.
3. Although peaceful picketing was authorized in S.C. 1876, c. 37, it was omitted in the consolidation of the *Criminal Code* in 1892 and then restored in 1934 in S.C. 1934, c. 47.
4. *Trade Union's Act* (35 Vict. c. 30); *An Act to Amend the Criminal Law Relating to Violence, Threats and Molestation* (35 Vic. c. 31).
5. For a full discussion of the criminal and civil law constraints on union activity see A.W.R. Carrothers, *Collective Bargaining Law in Canada* (Butterworth, 1965), chap. 2.
6. *Trade Unions Act*, S.B.C. 1902, c. 66, s. 3, repealed by S.B.C. 1959, c. 90. However, the then British colony of Newfoundland followed the labour law reform example of the imperial government when in 1910 it amended its *Trade Union Act* (Imp. Acts 38 and 39 Vict. c. 84), by incorporating as a schedule to that statute the English *Trade Disputes Act* (1906) 6 Ed. VII c. 47 and the *Conspiracy and Protection of Property Act* (1985), Imp. Acts 38 and 39 Vict. c. 36.
7. Arthurs, "Developing Industrial Citizenship: A Challenge for Canada's Second Century" (1967), 45 *Canadian Bar Review* 786 at p. 786.
8. *Industrial Disputes Investigation Act*, R.S.C. 1907, c. 20.
9. *Labour Gazette*, vol. VII, 1907, p. 1109.
10. H.D. Woods, S. Ostry, and M.A. Zaidi, *Labour Policy in Canada*, vol. I of *Labour Policy and Labour Economics in Canada* (Macmillan, 1973), p. 341.
11. [1925] A.C. 396 (Judicial Council of the Privy Council).
12. *Eastern Canada Stevedoring Company*, [1955] 3 D.L.R. 721 (S.C.C.).
13. 49 Stat. 499 (1935).
14. *Ibid.*
15. S.C. 1934, c. 47, s. 381(2).
16. Desmond Morton, "The History of Canadian Labour," in *Union Management Relations in Canada*, John Anderson and Morley Gunderson, eds. (Addison-Wesley, 1982), pp. 105–106.
17. Woods, Ostry, and Zaidi, *supra*, note 10, p. 93.
18. Carrothers, *supra*, note 5, p. 6, n. 1.
19. Recent scholarship has revealed that union growth is a product of its environment, both within the union and in the larger external setting. Although the public policy framework for union organization and collective bargaining is a key determinant of union density, there are other important factors which impact on union growth. Other major environmental determinants include: the rate of economic growth in Canada, levels of employment, real wage gains, the international competition in new and traditional industries, the spread of new technology and its impact on industrial and occupational patterns of labour demand and labour supply, the social environment reflected in public attitudes, worker apathy, etc., and the organizational resources, strategy, structures and policies of unions. See Pradeep Kumar, "Union Growth in Canada: Retrospect and Prospect," in *Canadian Labour Relations*, volume 16 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (University of Toronto Press, 1985).
20. *Ibid.*; for statistical data see Labour Canada, *Labour Organizations in Canada* (Minister of Supply and Services Canada, 1983).

21. Kumar, *supra*, note 19.
22. R. Lacroix, "Strike Activity in Canada," in *Canadian Labour Relations*, volume 16 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (University of Toronto Press, 1985); see generally, S.M. Jamieson, "Industrial Conflict in Canada, 1966–75," Discussion Paper 142 (Economic Council of Canada, 1979).
23. See generally, Morley Gunderson, "Union Impact on Wages, Fringe Benefits, and Productivity," in John Anderson and Morley Gunderson, eds. *Union-Management Relations in Canada* (Addison-Wesley, 1982), pp. 260–61.
24. P.C. Weiler, *Reconcilable Differences* (Carswell, 1980), p. 28. See also G. MacDonald and J. Evans, "The Size and Structure of Union/Non-union Wage Differentials in Canadian Industry" (1981) 14, *Canadian Journal of Economics* 216. These researchers calculate the union/non-union wage differential as 24.0 percent, 11.3 percent and 13.6 percent for skilled, semi-skilled and unskilled workers respectively, over the period 1971–76.
25. Gunderson, *supra*, note 23, p. 261, explains this impact in these terms: "The differential is smaller the greater the proportion of the industry that is organized. The data suggests that as the industry becomes more organized, non-union wages rise more rapidly from the 'threat' effect than do union wages from the 'coverage' effect, the latter reflecting the difficulty of substituting towards non-union output as coverage increases."
    Ibid., at pp. 262–63, reports that some empirical research indicates that collective bargaining will increase fringe benefits for workers even more than it increases wages. Fringe benefits in the form of deferred compensation may also be more prevalent in the organized work force. Unionized workers are more likely to accept deferred wages because collective agreements offer protections against arbitrary dismissal. This form of employment security makes it more likely the workers will actually receive this deferred income. An important effect of deferred wage schemes in collective agreements is the reduced turnover rate in unionized settings, which is explained by the fact that employees who quit might lose some or all of their deferred wages (e.g., pension and vacation rights). The impact on productivity of deferred income, seniority rights and other common features of a collective agreement are discussed in the section on the value of collective bargaining.
26. *Ibid.*
27. Weiler, *supra*, note 24, p. 32.
28. Carrothers, *supra*, note 5, p. 38.
29. *Ibid.*, p. 53.
30. *Labour Relations Act*, R.S.O., 1941, c. 162A as amended by S.O. 1953–54, c. 10; this section was omitted from the *Labour Code*, S.O. 1964, c. 141.
31. *Labour Relations (Amendment) Act*, S.N. 1959, c. 1; amended by S.N., 1960, c. 58; repealed by S. N. 1963, c. 82.
32. *Trade Union Act*, P.E.I. 1948, c. 38, ss. 3, 5(2).
33. *Labour Relations Act*, R.S.B.C. 1960, c. 205, s. 9(6) as amended by S.B.C., 1961, c. 31, s. 5.
34. *Maritime Transportation Unions Trustees Act*, S.C. 1963, c. 17.
35. *O.C.A.W., Local 16-601 v. Imperial Oil*, [1963] S.C.R. 584, see comments (1964), 3 *Osgoode Hall L.J.* 203; (1964), 22 *U.T. Fac. L. Rev.* 161.
36. Arthurs, *supra*, note 7, p. 794.
37. *Trade Disputes Act*, 1906, 6 Edw. VII, c. 47.
38. *Norris–La Guardia Act* (1932), 47 Stat. 70.
39. *Young v. C.N.R.*, [1931] A.C. 83, p. 83.
40. A. Bromke, *The Labour Relations Board in Ontario* (McGill University, Industrial Relations Centre, 1961), pp. 60–61; see also H.A. Logan, *State Intervention and Assistance in Collective Bargaining: The Canadian Experience, 1943–1954* (University of Toronto Press, 1956).
41. Arthurs, *supra*, note 7, pp. 814–15.

42. *Ibid.* See also P.C. Weiler, "The Slippery Slope of Judicial Intervention" (1970), 9 *Osgoode Hall L.J.* 1. For a detailed discussion of the manner in which an administrative board can react to a labour dispute and the contrast with the way in which a court handles the same issue, see P.C. Weiler, "The Administrative Tribunal: A View from the Inside" (1976), *U. of T.L.J.* 193.
43. A.W.R. Carrothers, *A Study of the Operation of the Injunction in Labour-Management Disputes in British Columbia 1946–1955* (C.C.H. Canadian, 1956), p. 210.
44. There is no doubt that the experience under the B.C. *Labour Code* has had considerable impact on the direction of law reform in other Canadian jurisdictions; see George W. Adams, "The Impact of the Code Beyond the Province"; and James E. Dorsey, "Leadership and Law Reform: Stimulation and Stamina," in *The Labour Code of British Columbia in the 1980's*, J.M. Weiler and P. Gall, eds. (Carswell, 1984), pp. 219–40 and pp. 240–50 respectively.
45. Weiler, *supra*, note 24, pp. 295–96.
46. *Ibid.*, p. 297.
47. P. Gall, "Regulation of Picketing Under the B.C. Labour Code: Some Cracks in the Institutional Foundation," in *The Labour Code of British Columbia in the 1980's*, J.M. Weiler and P. Gall, eds. (Carswell, 1984), p. 143.
48. See Raymond Mathes, "The Mediative Role of the Labour Relations Board of British Columbia in Disputes Involving Work Stoppages," M.Sc. thesis, University of British Columbia (1982), pp. 94–136. Mathes analyzes a survey of union and employer responses to questionnaires and personal interviews on the subject of their perception of the desirability of the B.C. Labour Relations Board's "administrative, curative approach to illegal work stoppages as contrasted with the court injunction process."
49. See D. Lewin and S. Goldenberg, "Public Sector Unionism in the U.S. and Canada" (1980), 19 *Industrial Relations* 239.
50. P.C. Weiler, "Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA" (1983), 96 *Harvard L. Rev.* 1769.
51. An interesting contrast is shown by the recent adoption in the B.C. *Labour Code* (in May 1984) of the "quick vote" and the abandonment of the union membership card method of assessing the degree of support among workers for the union which is applying for certification. The practice of the B.C. Labour Relations Board has been to conduct a secret vote within five working days of the receipt of an application for certification. The ballots are then sealed until any problems of defining the appropriate bargaining unit, excluding managerial employees, etc., are resolved. My discussions with management lawyers about the impact of this change of procedure disclosed that employers appear to be more satisfied with the accuracy of the results of a secret ballot among their workers as disclosing the true wishes of the work force about unionization as opposed to the evidence of a number of union membership cards because of the suspicion on the part of employers that the employees have been steamrolled by peer pressure or fooled by the union organizers into joining the union. When notified by the board of the application for certification, the tendency of the employers has been to phone their labour lawyers first, rather than to begin firing union sympathizers. This practice of seeking advice from ethical management-side lawyers rather than engaging in unlawful anti-union conduct, coupled with the increased satisfaction on the part of the employers about the accuracy of the evidence of employee preferences as exhibited in a secret election, has caused a reduction in the number of unfair labour practices at the organization stage in British Columbia. The fact that the vote is held so soon after the application for certification has been received by the Labour Relations Board has militated against a sophisticated anti-union organization campaign being devised by the employers.
52. See R.B. Freeman, and J.L. Medoff, *What do Unions Do*? (Basic Books, 1984), pp. 237–38, where the author estimates that roughly 40 percent of the decline in union success in NLRB certification elections can be attributed to the rise in illegal employer resistance during the campaign.
53. See P.C. Weiler, "Striking a New Balance: Freedom of Contract and the Prospects for Union Representation" (1984), 98 *Harvard L. Rev.*, p. 351; W. Cooke, *Failure to*

Negotiate the First Contract: Causes and Policy Implications (1983). In the latter study, the author analyzed the behaviour in 118 of the 137 certifications issued by the NLRB in its Indiana Region in 1979–80 and in a sample of 140 elections won nationally by AFL-CIO unions during the same period. He found that the occurrence of an unfair labour practice reduced by roughly one-third the likelihood of a first contract being reached. For a further discussion of labour relations board remedies, see the section entitled "Successful Legal Strategies."

54. It should not be understood from this description of the certification process in Canada that this is the only factor which explains the differences in union density between Canada and the United States. As noted earlier (note 19) the legal environment is the major but not the only determinant of union growth. There are other key differences between U.S. and Canadian labour law which have also had a major impact on the degree of unionization in the two countries. For example, even if a union does manage to achieve a first collective agreement, there is still the opportunity for subsequent erosion of union support. Some first agreements are not renewed because of plant closings, the sale of businesses, or employee apathy. American unions are at some disadvantage compared to Canadian unions in maintaining the support of employees within their bargaining units because of the different legal rules which apply to union security clauses. In the United States, the *Taft-Hartley Act* of 1947 banned the closed shop explicitly and entirely, and the union shop was prohibited obliquely. The agency shop was still legally permissible under the federal labour law. However, the individual states were allowed to ban this form of union security. To date, about half of the American states, primarily in the traditionally unorganized areas of the South and Southwest, have prohibited the agency shop within their boundaries. These legal restrictions in the United States on union security clauses in collective agreements stand in stark contrast to Canadian labour law. For example, in British Columbia, Ontario and Quebec it is an unfair labour practice for an employer in a first contract negotiation to refuse to agree to an agency shop. The focus of Canadian law has been not to outlaw union security provisions but rather to apply the duty of fair representation obligations of the union in a manner which will prevent abusive operation of union security provisions (see Weiler, *supra*, note 24 pp. 140–50, and D.T. Ellwood and G.A. Fine, *The Impact of Right to Work Laws on Union Organizing*, Working Paper 1116 (National Bureau of Economic Research, 1983).

55. The one exception was Saskatchewan where government employees were included in the coverage of its general labour legislation, *The Trade Union Act*, R.S.S. 1944.

56. Weiler, *supra*, note 24, pp. 214–15.

57. See Robert Swidinsky and David Wilton, "Public Sector Policy," draft paper prepared for the Royal Commission on the Economic Union and Development Prospects for Canada, May 1984, at p. 16.

58. Alan Ponak, "Public Sector Collective Bargaining," in *Union-Management Relations in Canada*, John Anderson and Morley Gunderson, eds. (Addison-Wesley, 1982), pp. 349–50.

59. In fact, the recent Swidinsky and Wilton study (*supra*, note 57) reached the following conclusions about the inflationary impact of public sector bargaining in Canada over the past 15 years:

> Based on our review of the existing literature and analysis of recent wage settlements data, we would draw the following three conclusions concerning public sector wage compensation:
>
> (1) Over the 1967–83 time period, on average public sector wage rate increases have been *lower* than wage rate increases in the private sector.
>
> (2) The economic structure of wage settlements in the public sector (excluding arbitrated settlements) is *not* dissimilar from the structure of wage settlements in the private sector. In particular, there is no clear empirical evidence that public sector wage rate increases have been *less* responsive to labour market conditions than wage changes in the private sector.
>
> (3) There is *no* empirical evidence that public sector wage settlements will, in general, spill over into the private sector and permeate throughout the entire economy. Any wage spillovers from the public sector would appear to

be quite limited in nature, confined to specific urban areas and certain occupations. There is no empirical support for the proposition that one large public sector wage settlement, say for seaway workers or Toronto teachers, will affect wage settlements throughout the entire private sector.

60. We should not be surprised that the unionization of the public sector would tend to cause unusually high settlements in the nascent stages of collective bargaining. As in any other newly organized sector, in the short term, unionization of public employees will create a wage differential between union and non-union workers. These wage differentials will remain stable over time. However, during the period in which these differentials are being established, percentage increases in the newly unionized firms are usually higher than settlements in comparable bargaining situations elsewhere.

Swidinsky and Wilton, *supra*, note 57, have isolated another inflationary feature of public sector collective bargaining which does not exist in the private sector, i.e., the higher incidence of public sector wage settlements reached through binding arbitration. The Swidinsky and Wilton analysis of the 15 years of public sector bargaining in Canada reveals:

> Public sector wage settlements reached through binding arbitration have been much more inflationary and *perversely* related to labour market conditions. . . . On the other hand, a comparison of the estimated wage equation for *public* sector settlements reached by *direct bargaining* compared to all private sector wage settlements (in Table IV) reveals that "bargained" public sector wage settlements are characterized by less catch-up (.51 compared to .64), much greater sensitivity to labour market conditions (5.88 compared to .74). . . .

These findings are instructive about one potential adverse consequence of removing the right to strike in the public sector and substituting binding interest arbitration as the preferred method of settling wages.

See also Weiler, *supra*, note 24, pp. 61–62, 260–63, 279–86.

61. One explanation for the ability of the Japanese industrial relations system to adapt quickly to international inflationary forces without the need for government intervention is the flexible wage system in Japanese collective agreements and the yearly adjustments in base wage levels that occurs during the annual Spring Labour Offensive (*Shunto*). For a description of how these features work, see J.M. Weiler, "The Japanese Labour Relations System: Lessons for Canada," in *Labour-Management Co-operation in Canada*, volume 15 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (University of Toronto Press, 1985). For an analysis of the implications for Canadian public policy of flexible wage systems and yearly wage adjustments, see W. Craig Riddell, "The Responsiveness of Wage Settlements in Canada and Economic Policy" (1983), 9 *Canadian Public Policy* 23.

62. D.A. Wilton, "An Evaluation of Wage and Price Controls in Canada" (1984), 10 *Canadian Public Policy* 167, concludes at p. 172:

> While the AIB was the beneficiary of a very large *favourable* price shock in 1976 (which lowered the actual inflation rate by more than 3 percent over what it would have been), an equally large *unfavourable* price shock in 1977–78 almost completely obliterated all of the AIB's success on the wage front. Instead of exiting from controls with a 5 percent inflation rate, these large unfavourable price shocks in 1977–78 pushed the inflation rate back up to 9 percent and inflation expectations continued to hold in the 8 to 10 percent range.

63. P.C. Weiler, "New Horizons for Canadian Labour Law" in Meredith Memorial Lectures (1980), *New Developments in Federal and Provincial Labour Law*, (Richard DeBoo, 1981), p. 9.

64. The failure of the AIB to control deferred wage increases in existing longterm contracts also served to substantially delay the impact of the controls on wage inflation. As Wilton, *supra*, note 62, remarks at p. 173:

> If all workers were immediately brought under wage controls (by abrogating existing wage contracts which contained inflationary deferred wage increments), any built-in inflation momentum would have been reversed and there would have been no tendency for the rate of price inflation to continue to rise during the first year of controls.

65. H.W. Arthurs, "Free Collective Bargaining in a Regulated Society," in *The Direction of Labour Policy in Canada*, F. Bairstow, ed. (McGill University, Industrial Relations Centre, 1977), p. 107.

66. The high incidence of unfair labour practices during first contract negotiations was addressed in the evolving jurisprudence of the Ontario Labour Relations Board in *Radio Shack and Group of Employees and United Steelworkers of America*, [1979] 1 Can. L.R.B.R. 201. The Board interpreted its remedial authority in s. 79 of the *Ontario Labour Relations Act* to include a "make-whole remedy" for failure to bargain in good faith.

    Amendments to the *Canada Labour Code* (s. 171.1) and the *Quebec Labour Code* (s. 81) provided for first contract arbitration. For a discussion about the utility of first contract arbitration and the make-whole remedy see Weiler, *supra*, note 24, at pp. 49–56, and G.W. Adams, "Labour Law Remedies," in *Studies in Labour Law*, K.P. Swan and K.E. Swinton, eds. (Butterworth, 1982).

    Efforts were made to improve the system of mid-contract dispute resolution in order to ensure that it would act as an effective antidote to wildcat strikes. These reforms in the process of mid-contract dispute resolution included the use of government sponsored mediation and investigation. For a full discussion of these new dispute resolution mechanisms see J.M. Weiler, "Grievance Arbitration: The New Wave," in *The Labour Code of British Columbia in the 1980's*, J.M. Weiler and P. Gall, eds. (Carswell, 1984), pp. 158–95.

67. See Leo Panitch and Donald Swartz, "From Free Collective Bargaining to Permanent Exceptionalism: The Economic Crisis and the Transformation of Industrial Relations in Canada," in *Conflict or Compromise, The Future of Public Sector Industrial Relations*, M. Thompson and G. Swimmer, eds. (The Institute for Research on Public Policy, 1984), p. 407.

68. *Reference Re Anti-Inflation Act* (1976) 68 D.L.R. (3d) 452 (S.C.C.).

69. Thomas Kochan, "Empirical Research on Labour Law: Lessons from Dispute Resolution in the Public Sector" (1981), *U. of Ill. L. Forum* 161, p. 179.

70. Harry Arthurs, "Arbitration: Process or Profession," *Proc. 30th Ann. Meeting National Academy of Arbitrators* (1976), 222, p. 224.

71. Weiler, *supra*, note 66, pp. 162–75.

72. *Ibid.*, pp. 175–79. See also G.W. Adams, "Grievance Mediation by the Ontario Labour Relations Board: One Way to Fight Arbitration Costs in the Eighties," *Annual Report of the Ontario Ministry of Labour* (1981), pp. 77–81.

73. For detailed analysis of the operation of grievance mediation in the coal mining industry in the United States, see S.B. Goldberg, "The Mediation of Grievances Under a Collective Bargaining Contract: An Alternative to Arbitration" (1982), 77 *Northwestern Univ. L. Rev.* 270; S.B. Goldberg and J. Brett, "An Experiment in the Mediation of Grievances," in *Report to Department of Labor* (1982).

74. My criticism of the manner in which the *Anti-Inflation Act* was implemented should not be understood as an attack on the substantive merits of this effort to reduce wage and price inflation. As noted earlier, the macroeconomic rationale for the *Anti-Inflation Act* was that the wage setting mechanisms in the Canadian collective bargaining process were too sluggish in responding to the federal government's concurrent monetary and fiscal initiatives in the effort to control inflation. During the three year period of the *Anti-Inflation Act* the combination of these three macroeconomic devices managed to accomplish a deceleration in wage and inflation and a moderation of price inflation in Canada. We can contrast this three-pronged attack on inflation with the strategy that the government used to attack the record inflation levels of the early 1980s. In the latter case, the government used severe monetary and moderate fiscal restraint and no wage and profit control program, except in the case of statutory public sector wage restraint. While this program managed to bring down the inflation rate, it was only at the cost of prolonged periods of high unemployment, drastically reduced economic growth, and a high bankruptcy and business failure rate. In retrospect, it appears that a program of temporary national wage and profit controls is an attractive alternative to a strategy which relies solely on fiscal and monetary restraint to reduce inflation. The latter approach will reduce the inflation rate but only at great hardship in terms of unemployment and loss of output. In this regard, see Wilton, *supra*, note 62,

and W. Craig Riddell, "Dealing with Inflation and Unemployment in Canada: Options and Their Consequences," in *Dealing with Inflation and Unemployment in Canada*, volume 25 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (University of Toronto Press, 1985).

Despite the apparent success of the *Anti-Inflation Act* in macroeconomic terms, the manner in which the program was implemented was counter-productive in reaching its targets because it did not involve the industrial relations community in its initial planning and administration. One significant cause of the year of industrial relations strife which followed the introduction of the *Anti-Inflation Act* was the government's failure to consult with the major participants in the labour-management community about the details of the program prior to its enactment in October 1975.

75. James Matkin, "Government Intervention in Labour Disputes in British Columbia," in *Collective Bargaining in the Essential and Public Service Sectors*, Morley Gunderson, ed. (University of Toronto Press, 1975), p. 79.
76. *Essential Services Dispute Act*, R.S.B.C. 1979, c. 113.
77. *Mediation Commission Act*, S.B.C. 1968, c. 26.
78. Section 73(77) *Labour Code of B.C.*
79. *Public Service Labour Relations Amendment Act* 1983 — Bill 2; *Public Sector Restraint Act* — Bill 3; *Compensation Stabilization Act* (1983) — Bill 11.
80. P.C. Weiler, "The Process of Reforming Labour Law in British Columbia," in *The Labour Code of British Columbia in the 1980's*, J.M. Weiler and P. Gall, eds. (Carswell, 1984), pp. 29–30.
81. For a description of the extent to which collective bargaining legislation regulates technological change, see *Ottawa-Carleton Regional Transit Commission and Amalgamated Transit Union*, [1982] Can. L.R.B.R. 172 (Can. L.R.B.); *Eurocan Pulp and Paper Co. Ltd. and Canadian Paperworkers Union, Local 298*, [1983] 2 Can. L.R.B.R. (N.S.) 292 (B.C.L.R.B.). For a complete discussion of why union-management joint consultation should be required by law before management can implement a technological change that will have a negative impact on workers, see A.W.R. Carrothers, *Report of Commission into Redundancies and Lay-Offs* (Labour Canada, 1979).
82. Hon. Robert J. Hawke, I.L.O. *Provisional Record*, Sixty-ninth Session, Geneva, 1983, p. 16/5.
83. For an analysis of how union-management joint consultation at the enterprise level functions in Japan, see Weiler, *supra*, note 61, pp. 33–46. For a description of Japanese tripartism, see *ibid.*, pp. 46–50.
84. In this respect it is interesting to look at the direction of public policy in Ontario in the last five years. The Ontario government has been engaged in regular, low-profile consultation with union and management leaders. In addition, the government has been active in financing and promoting government-sponsored preventive mediation and quality of work life programs. These initiatives are designed to improve the industrial relations climate in the province so that the parties can concentrate on private law reform in their collective bargaining negotiations. In contrast, the direction of law reform in British Columbia in 1983–84 has been to abolish by statute certain contractual and bargaining rights previously enjoyed by unions and workers. The reaction of the trade union movement to these legislative changes has been a "no concessions policy" in negotiations with employers. In this poisonous industrial relations climate there has been little or no progress made in achieving the flexibility in contractual arrangements which the parties need to adapt to the competitive economic world of the 1980s. It will be interesting to monitor the progress in the reform of the law of the collective agreement that is achieved in these two contrasting negotiating settings in Central and Western Canada. The extent of progress in this area may be an accurate barometer of the economic vitality of these regions.
85. *Re Service Employees' International Union, Local 204 and Broadway Manor Nursing Home et al.* (1983), 4 D.L.R. (4th) 231, Ontario High Court of Justice, Divisional Court.
86. *Dolphin Delivery Ltd. v. Retail, Wholesale and Department Store Union, Local 580* (1984), 10 D.L.R. (4th) 198 (B.C.C.A.).

87. Weiler, *supra*, note 24, p. 31–33.

88. See M. Friedman, and R. Friedman, *Free to Choose* (Harcourt Brace Jovanovich, 1979), p. 224; H.G. Lewis, "Competitive and Monopoly Unionism," in *The Public Stake in Union Power*, P. Bradley, ed. (University of Virginia Press, 1959); Henry C. Simons, "Some Reflections on Syndicalism" (1944), 52 *J. Pol. Econ.* 1, 12; John Burton, "Capitalism, Democracy and the Problem of Sectional Interests," in *Trade Unions and Society: Some Lessons of the British Experience*, J.T. Addison and J. Burton, eds. (Fraser Institute, 1984), pp. 129–53.

89. See A. Rees, *The Economics of Trade Unions*, 2d ed. (University of Chicago Press, 1977), pp. 65–93; Kerr, "Labour's Income Share and the Labour Movement, in *New Concepts in Wage Determination*. G. Taylor and F. Pierson, eds. (1957), pp. 260, 269–71; L.M. Kahn, "The Effect of Unions on the Earnings of Non-union Workers" (1978), 31 *Indus. and Lab. Rel. Rev.* 205.

90. The most comprehensive econometric research on the impact of collective bargaining, in the American setting, has been published in a recent book by Freeman and Medoff, *supra*, note 52.

91. Weiler, *supra*, note 46, p. 1825, see also C. Brown and J. Medoff, "Trade Unions in the Production Process" (1978), 86 *J. Pol. Econ.* 355; K.B. Clark, "The Impact of Unionization in Productivity: A Case Study" (1980), 33 *Indus. and Lab. Rel. Rev.* 451. See also Gunderson, *supra*, note 23, pp. 263–64, where the author observes that unions have positive effects in productivity by "reducing turnover, shocking management into more efficient practices, improving morale and cooperation among workers, providing information about the collective preferences of workers, and by improving communications between labour and management." R. Freeman and J. Medoff, "The Two Faces of Unionism" (1979), 57 *Public Interest* 69, p. 80 suggest: "In manufacturing, productivity in the organized sector appears to be substantially higher than in the unorganized sector, by an amount that could roughly offset the increase in total costs attributable to higher union wages." See also *ibid.*, Freeman and Medoff, n. 88 at pp. 162–80.

92. Weiler, *supra*, note 50, p. 1826; see also R.B. Freeman, "Union Wage Practices and Wage Dispersion Within Establishments" (1982), 36 *Indus. and Lab. Rel. Rev.* 3, pp. 6–15; T. Hyclak, "The Effect of Unions on Earnings Inequality in Local Labour Markets" (1979), 33 *Indus. Arb. Lab. Rel. Rev.* 77; J. Pfeffer and J. Ross, "Unionization and Income Inequality" (1981), 20 *Indus. Rel.* 271. See also Freeman and Medoff, *supra*, note 90, pp. 43–94, 150–61.

93. On the issue of the alleged unequal distributional consequences of collective bargaining in the non-union sector, Freeman and Medoff, *supra*, note 90, pp. 160–61, conclude:

> The results in this chapter may surprise readers who believe that union wage gains come at the expense of non-union workers. . . . The evidence does not support this simplistic view but rather presents a more mixed picture. Some non-union workers gain from unionism, notably those in large non-union firms and in firms threatened by organization that choose to combat unionism with "positive labor relations." Other non-union workers, notably less skilled "secondary" workers, appear to lose from unionism. The net effect on the entire workforce is unclear. . . .

See also David Beatty, "Ideology, Politics and Unionism," in *Studies in Labour Law*, K. Swan and K. Swinton, eds. (Butterworth, 1983), p. 299; and Gunderson, *supra*, note 23.

2

The Use of Legislation to Control Labour Relations: *The Quebec Experience*

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Introduction

It is well known that legislators intervene frequently in the labour area. The proliferation of labour laws, the difficulty in establishing concordances among them, and particularly their inaccessibility are also commonplace. The contemporary legislator can no longer deal with labour in the manner of the civilists of the last century, as if it were simply a commodity supplied by a lessor. The labour of employees, the conditions in which it is performed, and the socio-economic context are changing so rapidly that constant readjustment of sights is required. These changes have become more apparent since World War II, that is, since Quebec's entry into the industrial age. What exactly is known about the various approaches taken by the legislator and, particularly, about the foundations and the agents of this legislative development, and its implications? There is certainly no ready satisfactory response to such a vast, complex question. We shall attempt, however, to seek a partial answer, as limited and fragmentary as it may be.

Legislative intervention as it applies to labour and the resulting relationships is a vital planning component in contemporary industrial society and the society of tomorrow. Labour relations, in the broad sense of the term, encompass numerous relationships between the contributors of capital, their many screening agencies and suppliers on one side, and producers of goods and services on the other. The rules governing these relationships, by their very purpose, are of great importance socially, economically and politically. Moreover, the content and genesis of these rules may reveal certain trends in political developments that government in our society may experience in the coming decades.

In one way, legislation, particularly labour legislation having strong economic implications, may be regarded as a trophy that is not always handed out to the same winners, since the political and economic situation may at times favour one interest group more than another. It is difficult to believe or presume, however, that the legislator can remain insensitive to pressure from such groups and can or must remain neutral, objective and impartial. Whatever the case, the effect of this legislation is not always to favour all subjects in the same manner. Thus it may be of interest to identify the winner or winners of recent labour legislation. This might be difficult, so changeable is the distribution of roles and functions in the field of labour relations. Such research would require that a number of new facts be taken into account.

- The state is not only a policeman and peacekeeper on the socio-economic front, but is also a sponsor and guarantor for innumerable enterprises, and has itself become a contractor and an employer.
- Employers are often managers, distinct from owners or shareholders of enterprises; the latter are able to maintain their anonymity by acting through trustees. Among these shareholders are many Quebec government agencies (Société générale de financement, Quebec Deposit and Investment Fund, etc.) and unions (pension fund managers, the Quebec Federation of Labour's Fonds de solidarité, etc.).
- Union federations, which are responsible for defending the socio-economic interests of employees, can no longer limit themselves to short-term action and must accept or be subject to medium-term policies. They may on occasion participate in developing and achieving these policies. As an example, union federation representatives take part in managing major portfolios of the Quebec Deposit and Investment Fund, and investments are made on behalf of the general population and employees (pension plans, construction industry social benefit plans, capitalization of workmen's compensation, etc.).

Without extending the trophy metaphor to interest groups benefiting most from this legislation, the broad thrust of labour legislation in the past 44 years may help us understand the influence exerted on it by economic and political events. From there, we may extrapolate to future directions, or rather directions that are desirable or plausible. We might better understand whether labour laws are only recycling instruments in a liberal or neoliberal system, or whether they can initiate more radical reform. We will not reply directly to this key issue; it will remain the basis of all the other questions that we will attempt to answer.

In a liberal system (one of free enterprise, competition, and equality of agents before the law), the parties to collective labour relations, as in any other economic relationship, should be able to negotiate and make contracts freely. The state should enact only essential laws, and the activity of economic agents should respond rather to economic laws.

The logic of the system and experience suggest that this freedom varies inversely with the intensity and complexity of state law. In sum, an ideal liberal regime presupposes minimal legislative intervention in labour relations. In this sense we say that the legislator's "silence" has not been neutral. The more the legislator intervenes in labour relations, the more these relations occur as a function of the rules set down by law, but not necessarily in conformity with their objectives. It is inadvisable, however, to place law and economic freedom in complete opposition, since in several respects the former is a result of the latter, or contains it. An analysis of the use made of labour legislation may be useful not only as a critique of the past, but particularly as a guide to the present situation, which in the end paves the way for tomorrow's society.

Labour laws enacted in the last 44 years have quite decidedly been influenced by their political and socio-economic context. Whereas politics and the economy are in a state of constant change and sometimes experience sharp jolts, each law, in its content, style, and sanctions, evokes, like a photograph, the surroundings in which it originated and the effect being sought at that time. Thus studying a law enables us to understand the use made of it in its political or economic context. Legislative texts, which appear neutral and static, themselves influence the behaviour of economic agents, since the agents act or react in part in terms of these rules. Like thought, which may be constrained, limited, or ossified, or by contrast, stimulating and exciting, depending on the choice of words used to express it, legislation, too, through its structure, wording and relevance, may either detract from or improve the quality of labour relations. If words have a definite power over thought in this way, the same may be true of the power of legislation over human conduct. While the law guides human activity or provokes reaction, its effects are not always those sought by the legislator.

With these general considerations and reservations as a starting point, we propose to sound out some of the uses that have been made of the law to contain labour relations. Can this system absorb the shock of the inevitable changes in production processes, and hence in labour processes, that will be experienced in the coming years? The nature of labour, the workplace, working hours, pace of work, and control mechanisms will be vastly different in the new computerized society. Not only may the meaning of work be radically altered, but the role of workers as well. Their participation may be more "social" and less economic. Thanks to automation and microprocessors, occupational activity may become more autonomous; the provision of work will translate, in law, into an obligation of end, rather than one of means, as is the case today.

Every indication is that systems of individual and collective labour relations will be turned upside down, if not totally changed, by the new technological revolution. If new legislation was needed to adapt to the needs of industrial society, we will no doubt require just as much radical

reform, and even abandonment of present laws, in order to adapt to the post-industrial age. Beyond futurology, the very concepts of "subordinate work" and its direct counterpart, "wages," may be called into question in the near future. These concepts, however, are the two legal and economic pillars of contemporary labour relations and law. Hence, the very specifications of the present legal structure might be reviewed in order to determine which parts need to be overhauled. For these reasons, we propose a retrospective view of the use of legislation in labour, to anticipate its role in the final years of the 20th century. Although we cannot directly answer the new and unprecedented issues now being raised, analysis of the present situation should enable us to take better advantage of our collective experience.

Approach

From what angle should we examine the labour-related legislative output of the past 44 years, in order to assess the use made of it? We are constrained by the limits of our resources to select a straightforward approach. It is our intention first to list the body of labour legislation, so as to highlight:

- labour and manpower legislation addressing the facts or the situation of labour or the workplace;
- legislation dealing principally with labour relations, that is, individual or collective relations between parties in the course of or by reason of work;
- legislation concerning state intervention, in all its forms, in labour conflicts or to decree working conditions;
- legislation focussing on the state as employer, including the public and parapublic sectors.

This inventory will provide us with quantitative data. However, preparing a simple, detached labelling and numbering of texts is not enough in itself. Laws are not a mere matter of chance, or the emanation of abstract views maintained by a few legal scholars. Rather, they are the legislator's response to problems and conflicts encountered or to numerous proposals, requests or demands from various pressure groups. They reveal the legislator's conception of labour, the role of the state, and the function of the law in this field. This is what we shall attempt to discover, or at least begin to discover. To this end, our study is divided into three sections:

1. a quantitative and qualitative assessment of the legislative output;
2. a study of the agents who may have participated in, demanded or caused the drafting of this legislation;
3. an analysis of the effects sought by the legislation and the effects actually achieved.

The combination of these three approaches should permit a better understanding of the role and function of labour legislation, the limits to its use and the risks of its misuse. It will also enable us to anticipate its future use, depending on the particular tenets one upholds or on changes in the economic and political situation. Such a review must first place the laws in their historical context, that is, relate them to the preceding era: data from this prior period will serve as a sort of prologue. In the second section, we will make a summary synthesis of legislative production during the 44 years, and in the last section we will establish a relationship between what the parties to labour relations have asked for, what political parties have offered, and what was obtained, intentionally or otherwise, beyond the intent and the letter of the law.

Clearly, the reader will find in this study only partial answers to the fateful question of the use that has been made or might be made of labour legislation. It is our intention to pursue and to complement this research. It is equally desirable that other studies be undertaken to show whether use of legislation is different in other provinces of Canada or in other countries.

Historical Context

We will restate succinctly some of the basic data, in order to place in context the legislative output from 1940 to 1984. The legislation was drafted in accordance with and in reaction to the social, political and economic situation of the period, and particularly in accordance with views on legislation held at the time.

First, we may observe that while the tree of labour law is highly sensitive to the winds of social, political and economic change, its trunk of general law seems so firmly rooted as to have remained nearly imperturbable. Thus, the general rules of civil and penal law governing such matters as property, accession, profit, and free trade and competition have not fundamentally changed or been altered by the advent of new rules of labour law. For example, labour legislation has not imposed a new definition of enterprise, or overturned the status of employer or employee. Previous legislative intervention, particularly from 1900 to 1944, was modest in scope, specific and in all cases fragmentary.

During the first half of the 20th century, labour legislation appeared mainly as a set of particular rules, adjustments or exceptions to general rules. One need only read certain provisions of the *Criminal Code* (ss. 380, 382, etc.) to observe the approach of exception and adjustment of rules making union activity legal and guaranteeing free exercise of the right of association for the collective defence of common interests. The situation in civil law is similar to that of penal law. First, the dogma relating to the freedom to make contracts and the intrinsic qualities of contracts, a product of the exercise of this freedom by equal citizens, are

such that it was believed that there was no reason to govern in any particular way the hiring of one's personal services (s. 1670); this twin basis reveals, on a strictly legal level, the dimension and exceptional character of labour legislation that was enacted during the first half of the 20th century. We need only cite a number of titles of labour acts of the time in order to illustrate this narrow approach:

- *An Act to Exempt from Seizure One-half of the Wages of Laborers* (S.Q. 1881, c. 18);
- *The Quebec Factories Act, 1885* (S.Q. 1885, c. 32);
- *The Quebec Trade Disputes' Act* (S.Q. 1901, c. 31);
- *An Act Respecting the Responsibility for Accidents Suffered by Workmen in the Course of their Work, and the Compensation for the Injuries Resulting Therefrom* (S.Q. 1909, c. 66).

The case-by-case, "eye-dropper" use of legislation gained its justification from the economic and political dogma of the time: economic laws (of supply and demand, free competition, etc.) and the broad rules of law were adequate, except in situations that had ostensibly become intolerable. Non-intervention in labour relations, except when absolutely necessary to stop certain excesses, most certainly favoured employers. The state as policeman, by ensuring the orderly movement of goods and persons over sturdy, unobstructed economic roads, permitted the growth of a particular type of labour relation, authoritarian on the part of job creators. In this sense the absence of direct intervention, we believe, produced a beneficial effect for free enterprise. It was abuse of the system and the difficult realization of the inadequacy of the rules, won piecemeal through pressure (as shown by the history of the trade union movement), that forced the state to intervene increasingly in labour relations and gradually modify the nature and even the intensity of the approach used. To back up these assertions, we will review the major legislation enacted during this period, dividing the acts into two categories — "immediate protection" acts and "service" acts:[1]

"Immediate Protection" Acts

These are acts to remedy abuses or provide measures of immediate or emergency protection for employees.

1881: *An Act to Exempt from Seizure One-half of the Wages of Laborers* (S.Q. 1881, c. 18): one-half of laborers' wages exempt from seizure.

1885: *Quebec Factories Act* (S.Q. 1885, c. 32): Inspection of industrial establishments to ensure protection of the public; minimum ages for workers; hours of work, etc.

1894: *Quebec Industrial Establishments Act* (S.Q. 1894, c. 30): Minimum age for workers raised from 12 to 13 for boys, remains at 14 for girls.

1907: *An Act Respecting the Observance of Sunday* (S.Q. 1907, c. 42): Prohibition of certain commercial or industrial activities on Sunday, "except in cases of necessity or urgency."

1909: *An Act Respecting the Responsibility for Accidents Suffered by Workmen in the Course of their Work, and the Compensation for the Injuries Resulting Therefrom* (S.Q. 1909, c. 66): Compensation by head of enterprise to victims of accidents occurring by reason of or in the course of their work. Amount of compensation is set by agreement between the parties, or by judgment.

1910: *An Act Respecting the Establishment of Employment Bureaus for Workmen* (S.Q. 1910, c. 19): Establishment of employment bureaus for workmen.

1915: *An Act Relating to the Retention of a Portion of Laborers' Wages for Purposes of Insurance* (S.Q. 1915, c. 71): Employer is prohibited from making any deduction from employees' wages for purposes of accident insurance.

1918: *An Act to Provide for One Day of Rest Each Week for Employees in Certain Industries* (S.Q. 1918, c. 53): Provides one day of rest per week for employees in hotels, restaurants and clubs.

1919: *The Women's Minimum Wage Act* (S.Q. 1919, c. 11): Commission appointed to set minimum wage for women.

1926: *Workmen's Compensation Act, 1926* (S.Q. 1926, c. 32): Replaces the *Act Respecting the Responsibility for Accidents Suffered by Workmen in the Course of Their Work, and the Compensation for the Injuries Resulting Therefrom* and the *Act Relating to the Retention of a Portion of Laborers' Wages for Purposes of Insurance*.

1931: *Workmen's Compensation Act, 1931* (S.Q. 1930–31, c. 100): "Employers . . . shall be liable individually to pay the compensation."

1933: *An Act Respecting the Limiting of Working Hours* (S.Q. 1933, c. 40): ". . . a better distribution of labour . . . by offering to a greater number of workmen, who ask no more than to work, an opportunity to do so; . . ."

1934: *An Act Respecting Forest Operations and Woodsmen* (S.Q. 1934, c. 22): Sets conditions of employment for woodsmen. Supervisory commission called the Quebec Forest Operations Commissions set up to establish and ensure minimum wages and reasonable working conditions for woodsmen.

1940: *Minimum Wage Act* (S.Q. 1940, c. 39): Repeals and replaces the *Fair Wage Act* (S.Q. 1937, c. 50); Minimum Wage Commission replaces the Fair Wage Board.

"Service" Acts

This list includes acts that facilitate or permit collective action as an indirect means of protection for workers, or that take account of collective bodies already in place.

1901: *Quebec Trade Disputes' Act* (S.Q. 1901, c. 31): Prevention and settlement of labour conflicts through voluntary recourse to a conciliation and arbitration mechanism.

1921: *The Municipal Strike and Lock-out Act* (S.Q. 1921, c. 46): Compulsory conciliation and arbitration procedure in the public utilities.

1924: *An Act Respecting Professional Syndicates* (S.Q. 1924, c. 112): Incorporation of associations of employees.

1931: *An Act Respecting the Department of Labour* (S.Q. 1930, c. 19): Creation of Department of Labour.

1932: *Industrial Disputes Investigation Act* (S.Q. 1932, c. 46): application of the federal *Industrial Disputes Investigation Act, 1907* (S.C. 1907, c. 20, amended by S.C. 1925, c. 14), to industrial disputes exclusively within Quebec's jurisdiction.

1934: *An Act Respecting the Extension of Collective Labour Agreements* (S.Q. 1934, c. 56): Enables application of a collective agreement to be extended to an entire economic sector.

1939: *An Act Respecting the Arbitrating of Disputes Between Certain Charitable Institutions and Their Employees* (S.Q. 1939, c. 60): Strikes prohibited in charitable institutions, and arbitration of disputes.

1940: *An Act Establishing the Superior Labour Council* (S.Q. 1940, c. 37): Creation of a consultative organization for the study of social questions.

This brief review of major legislative measures up to 1940 enables us to make six observations preparatory to a study of the subsequent period.

The acts, because of their diversity and respective limits, do not seem to have resulted from any overall plan or program or any consistent thought. They represent only specific legislative solutions to predetermined or specified problems or difficulties.

Some of these legislative interventions (the 1881, 1909 and 1919 acts) have a highly limited purpose, and only gradually were the scope and beneficiary population broadened. There is no better illustration of this point than the distant origin of the *Act Respecting Labour Standards* and the *Act Respecting Occupational Health and Safety* (for the former, see acts of 1918 and 1919; for the latter, acts of 1885, 1894 and 1909).

The social and economic situation of the 1930s left a direct imprint on several of these legislative interventions, particularly on the 1933 act to achieve a better distribution of working hours among a greater number of workers and the 1934 act whereby the state intervened more directly to

provide more protection for workers in forest operations (large number of workers, proliferation of subcontractors, isolation, etc.).

The present system of "no-fault" liability in occupational accidents was adopted in several stages: acts of 1909, 1915, 1926 and finally 1931, with the *Workmen's Compensation Act* (S.Q., 1930–31, c. 100), in which employers became individually liable.

Conciliation and arbitration were only services provided by the state for the parties to a labour dispute, to the extent that they agreed to use those services. Agents of the state remained in the firm's front lobby, so to speak, and entered only when they were invited.

Three acts in particular, those of 1924, 1934 and 1940, because of the European origin of their sources, indicate the centres of influence in Quebec at that time:

- The 1924 *Act Respecting Professional Syndicates* was a Quebec combination of two French laws: an 1884 act respecting the right of association, and a 1919 act concerning collective agreements.[2]
- The 1934 *Act Respecting the Extension of Collective Labour Agreements* is also of European origin: the authors of the bill were inspired by publications of the International Labour Office, the Italian corporations act, and the Weimar Republic decree adopted in 1918.[3]
- The Superior Labour Council was created following a recommendation by the study commission formed in 1937; the 1940 Quebec Act was inspired to a great degree by the experience of France and Belgium, where such joint advisory bodies had existed since 1881.

In that period of classic economic liberalism, the state seems to have followed the laissez-faire approach in labour relations as well. It was believed that the conduct of collective labour relations should be left strictly to the parties involved: the employer remained free to bargain with the union representing his workers and was only morally bound by the collective agreement thus concluded (a "gentlemen's agreement"):

> Thus, before 1943, labour law in Canada consisted largely of legislation and judicial decision governing the legality of strikes, picketing and boycotts, their purpose and their range. Such collective agreements as were made through voluntary or economically-induced negotiations had no legal force of their own. The Courts in Canada, following in this respect as in many others, the Courts in Great Britain, treated collective agreements as merely "gentlemen's agreements", available for the purpose of establishing by reference the terms of individual contracts of employment, but not themselves binding in law either upon the employer or the trade union which were parties to them.[4]

This was a simple transposition to the collective level of the civilist dogma on the freedom to conclude agreements, in which the contract set

down the law for the parties to it. Thus it was taught that the state should do nothing more than facilitate meetings between employer and union, and that these two would subsequently be able to reach acceptable satisfactory arrangements by themselves. William Lyon Mackenzie King counselled this policy and practised it himself with American as well as Canadian industrialists.[5] Such an approach was certainly no herald of the compulsory arbitration of grievances and preventive conciliation common fifty years later.

On an individual level, the state adopted a more protectionist approach, following the British model. This is how A.E. Grauer summarized for the Royal Commission on Dominion-Provincial Relations the growth of labour legislation in England:

> The rapidly growing industrial system soon became so complicated both in its social and economic implications that unrestricted competition seemed certain to lead to chaos. In the long run it was in the interests of the employer as well as the employee for the state to set limits to free competition where social interests were involved.
>
> In 1824–25, the right to form unions was legally recognized and this added a powerful factor to the agitation for labour legislation. With the advent of the "new model" or craft unionism after the middle of the century, trade unionism soon became strong enough to have weight politically and was able to broaden the field of state intervention and to accelerate the tempo of labour legislation. The scope of such legislation widened from sentimental protection of the weakest workers to practically the whole field of relations between the employer and the employee. With the formation of the Labour Party, the unions had a direct voice in Parliament and were in a position to bring pressure for improved working conditions on a wide front.[6]

Later in his study, Grauer shows the close relation between adoption of labour legislation and the economic situation:

> Since the Great War, the Great Depression has been the chief stimulus to labour legislation and social insurance. The note sounded has not been so much the ideal of social justice as political and even financial expediency. For instance, the shorter working week was favoured in unexpected quarters not because it would give the workers more leisure and possibilities for a fuller life but because it would spread work . . .[7]

Grauer draws another, highly revealing conclusion regarding one of the effects of industrialization, anonymity of the worker:

> But with the growth of industrialization and urbanization, the lack of the restraining influence of the old local conscience made legislation for all workers necessary.[8]

In 1955, Maître Jean H. Gagné gave the following description of the situation to another commission of inquiry:

> It was a time when relations between employers and employees were tend-

ing to lose their individual character. The worker's condition, generally speaking, was hardly enviable. Conflicts had arisen or were looming over the horizon. The trade union movement, in full expansion, had to struggle against a stiffening of management resolve. Remedies had to be found to these new problems. And so was created one of the essential tasks of successive governments of the Province of Quebec in the period from 1900 to 1953.[9] [Translation]

On the same topic, the Privy Council's Task Force on Labour Relations described the role of state law, instead and in place of economic laws, in these terms:

> Thus the force of law was put behind what were considered to be minimum standards of pay and working conditions. Politically determined criteria of equity were substituted for the terms of employment that would have been produced by unrestrained market forces. Government thereupon became party to the employment relationship.[10]

Beginning in the 1940s, a number of economic, social, political and cultural factors profoundly altered the background, often in sudden jolts and at an accelerated rate. Thus, the pragmatic approach of the legislator is used even further, leaving very little room for planned, coherent intervention. It is clear then that labour legislation was not the fruit of research and extended consultation with the parties involved. A radical change in the model should be noted, however. In the context of economic recovery and the war effort, Canada was inspired increasingly by North American formulas, derived somewhat from Roosevelt's New Deal in the United States.

A simple review of some of the statistics reveals that Quebec, like the other major provinces in Canada, experienced considerable changes both structurally and in the economic climate. By way of information, Tables 2-1 to 2-4 illustrate certain major trends of change in Quebec for the period under study (1940–84).

Although the data are simple and limited, these four tables enable the reader better to situate the social, political and economic context in which labour legislation enacted since 1940 must be placed and to note the prodigious leap forward in that period. To better illustrate the point, let us refer to two "whereas" clauses from the *Minimum Wage Act* of 1940, which depict clearly the high social purpose attributed to such labour legislation:

> Whereas social justice requires the regulating of labour whenever the economic situation involves unjust conditions for the employee;
>
> Whereas the tolerating of the forced acceptance of insufficient remuneration is to fail to take into account the dignity of work and the necessities of an employee and his family;[11]

It is understandable that labour legislation was seen as a set of rules of law to protect the working class, the purpose of which was to govern

TABLE 2-1 Changes in Employment by Major Economic Activity Sector in Quebec, 1961–81

Sector	1961	1966	1971	1976	1981
			(percent)		
Primary	12.9	9.2	7.5	5.0	4.8
Secondary	35.7	35.6	31.4	29.9	26.4
Tertiary	51.4	55.2	61.1	65.1	68.8

Source: Statistics Canada data.

Note: Losses in the primary sector (−8.1%) and secondary sector (−9.5%) over the twenty-year period were picked up by the tertiary sector (+17.4%).

TABLE 2-2 Active Population in Quebec, 1946–83

Year	Unemployment Rate (%)	Activity Rate (%)	Unemployment (000s)	Employment (000s)	Active Population (000s)
1946	4.0	53.6	54	1,283	1,337
1951	2.9	53.9	42	1,420	1,462
1956	5.0	53.1	80	1,535	1,615
1961	9.2	52.8	169	1,652	1,820
1966	4.7	54.3	100	2,016	2,116
1971	8.2	54.9	197	2,197	2,394
1976	8.7	58.3	233	2,456	2,689
1981	10.4	61.2	311	2,685	2,996
1982	13.8	59.7	407	2,540	2,947
1983	14.0	60.4	427	2,642	3,069

Source: Statistics Canada data.

Note: The activity rate for men has declined noticeably (from 85.7% in 1946 to 74.5% in 1983), while the rate for women rose from 22.2% in 1946 to 47.1% in 1983. To better understand the data, it should be recalled that the female active population grew by 62% from 1971 to 1983, while the active population of men grew by only 12% in the same period.

relations between employers and workers, and more generally to improve the social condition of workers.[12] Social, political and economic change from 1940 to 1984 has noticeably altered this concept of a "good law." True, present problems are different from those of the 1940s — youth unemployment in the 15–24 age group, part-time work, growing influx of women into the labour market, stagnant unionization, aging of the active population, etc. The number of labour laws enacted since 1940 is quite large, and the diversity of problems encountered during this period of industrialization enables the phenomenon to be explained. This is the purpose of the following section.

Labour Legislation Since 1940

It is our intention to present, in a summary and even schematic fashion, labour legislation enacted in Quebec since 1940. To avoid becoming

TABLE 2-3 Full-time and Part-time Employment by Sex in Quebec, 1976–83 (thousands)

	Total Active Population						Men				Women			
	Total		Full-time		Part-time		Full-time		Part-time		Full-time		Part-time	
Age and Status	1976	1983	1976	1983	1976	1983	1976	1983	1976	1983	1976	1983	1976	1983
Total	2,455	2,642	2,274	2,298	182	344	1,525	1,473	56	102	749	825	126	242
15–24	617	553	533	408	85	145	290	216	41	67	243	192	44	78
25–44	1,166	1,381	1,109	1,255	57	126	771	810	5	18	338	445	52	108
45–54	407	417	387	380	20	37	278	264	—	5	109	116	18	32
55–64	229	249	217	224	12	24	165	166	—	6	53	59	9	18
65 and over	36	42	28	31	8	11	21	17	5	5	7	14	—	6
Married	1,619	1,791	1,531	1,614	89	178	1,133	1,119	12	28	397	494	76	150
Single	720	702	635	551	85	150	347	299	42	72	289	253	43	79
Other	116	149	107	133	9	16	45	55	—	—	63	78	7	13

Source: Statistics Canada data.

Notes: Full-time employment consists of persons ordinarily working 30 or more hours per week, plus those who ordinarily work less than 30 hours per week but consider themselves as being employed full-time. Part-time consists of all others who ordinarily work less than 30 hours per week.

The data highlight the growth in part-time employment compared to full-time. In 1976, 2,274,000 people worked full-time and 182,000 part-time, while in 1983, 2,298,000 were employed full-time and the number of part-time workers reached 344,000, or nearly double the number in only seven years.

Part-time workers are mostly women, and their numbers are increasing at a faster rate than the numbers for men.

TABLE 2-4 Overall Rate of Unionization in Quebec, 1946–81

Year	Union Membership	Percentage of Active Population
1946	208,546	15.6
1951	239,800	16.4
1956	316,682	19.6
1961	353,300	19.4
1966	514,606	24.3
1971	653,673	27.3
1976	846,619	31.5
1981	880,199	29.4

Source: Dictionnaire canadien des relations du travail, Statistics Canada, Catalogue 71-202, pp. 654–55.

sidetracked in a mass of detail, this review of the legislation will be in two stages. We will first look at what was in fact produced in the course of the past 44 years, that is, the number of laws passed and their breakdown under different headings. We will subsequently present a brief analysis of the content of these laws, divided into four categories.

One hundred and twelve laws were passed between 1940 and 1984. The table in Appendix A provides the references for these laws and allows the following observations to be made:

- There are only 9 years out of the 44 in which the Quebec National Assembly did not enact labour legislation. The nine silent years all fall between 1942 and 1966. With the exception of one year, 1942, all the years in which there was no labour legislation passed were under the same party, the Union nationale.
- Following a series of seven labour laws intended to assist Quebec's adjustment to the new industrial context of the post-war years (1944–47), legislative output slowed considerably up to 1959 (only six laws passed between 1948 and 1958). Production resumed its accelerated pace in the period known as the Quiet Revolution, when 23 laws were passed between 1959 and 1969.
- Legislative output in the five decades breaks down as follows: 1940–50, 13; 1950–60, 7; 1960–70, 22; 1970–80, 47; and 1980–83, 23.
- There have been more labour laws passed since 1970 (a total of 70) than in the preceding 30 years (42).
- If the rate of the past four years (23 laws between 1980 and 1983) is maintained, a peak of 58 laws passed may be reached by the end of the 1980s.
- These 112 laws may be listed by their main object[13] (see Table 2-5). Depending on the political party forming the government, the 112 laws breakdown in a highly particular manner (see Table 2-6).
- Table 2-6 shows that the Parti québécois has been more prolific in this field than the other two parties, with an average 5.3 laws per year. Note

TABLE 2-5 Number of Laws by Main Object

Main Object or Features		Total
A	Manpower and the workplace	16
B	Labour relations (individual and collective)	20
C	State intervention in labour conflicts or intervention to impose working conditions	38
D	State as employer, including public and parapublic sectors	38

TABLE 2-6 Number of Laws by Government in Power

Government	Years	Number of Labour Laws[a] A	B	C	D	Total	Total No. of Laws/No. Years in Power
Liberal	1940–44	0	2	5	1	8	
	1960–66	0	4	3	2	9	45 laws in
	1970–76	3	3	14	8	28	16 years
Union nationale	1945–60	1	7	2	2	12	24 laws in
	1966–70	2	2	2	6	12	19 years
Parti québécois	1976–84	10	2	12	19	43	43 laws in 8 years

a. Breakdown by the four categories in Table 2-5.

that the previous Liberal government, from 1970 to 1976, had already reached an average of 4.6 laws annually. Legislative output since 1970 has been accelerating with each passing year.

These few recapitulative observations aside, the reader should consult the table given in Appendix A to understand the intensity, diversity and multiplicity of these labour laws. Also, a reading of each of these legislative acts will give an understanding of their scope, through the choice of means used, their object, their definitions, and finally their relatively short-lived nature (in the sense that they are quickly amended or replaced). We shall now emphasize what, in our view, represents their most characteristic features.

Of all these legislative acts, which ones appear to have affected, held back or coloured labour relations the most, and why? Has the legislator's general approach remained constant over the 44 years, in the sense that each legislative intervention was based on the same philosophy? Since it would appear impossible to approach these questions comprehensively, we will merely emphasize the broad outlines of these major laws, by grouping them into the four categories previously described: A) Laws Relating to Manpower and the Workplace; B) Laws Concerning Labour Relations; C) Laws of Direct State Intervention in Labour Conflicts and Working Conditions; and D) The State as Employer. This will serve as a general reminder of the features of the

major laws enacted during the period. The data will also permit us, in the third section, better to distinguish between what was asked for and what was offered. Following this discussion, we will make a critical summary of the real scope of the laws, beyond the letter of the law, and of the government's statements, proposals by political parties, and demands by the parties to labour relations.

A) Laws Relating to Manpower and the Workplace

This group includes 16 laws.[14] Among them we should emphasize primarily the *Charter of Rights and Freedoms* (no. 75.1 in Appendix A), which, first and foremost, specifies and guarantees the basic, irrevocable rights of the worker:

- right to integrity and individual freedom (ss. 1 and 46);
- freedom of expression, assembly and association;
- equality of rights (s. 10), particularly in placement, hiring, training, promotion, pay, union membership (ss. 16 and 17).

The amendments recently made to the Charter to ensure equal pay go beyond the declaratory statement and the self-evident. They involve definite choices by the state that may noticeably alter hiring procedures, and even labour relations, in many workplaces, because:

- the employer or his representative may not ask questions in discriminatory areas such as age, sex, religion or marital status (s-s. 18.1);
- A penal or criminal record can no longer be grounds for refusal to hire or for dismissal (s-s. 18.2).

In addition, business may be constrained, in the coming years, to observe a specific, special equal opportunity program, intended to remedy previous causes of discrimination (ss. 86.1 ff.). The latter measures (not yet proclaimed) will place increasing emphasis on equality, and less on freedom, since present and future collective agreements, like any other agreement, must make room for these corrective programs.

Among the 16 laws in group A, five deal more particularly with certain variables of the labour market, such as vocational training, supervision of qualifications, and duration of active working life.[15] A simple comparison between the *Apprenticeship Assistance Act* (45.1 in Appendix A) and its 1969 replacement, the *Manpower Vocational Training and Qualification Act* (69.5), reveals the radical change that was made. In 1945, vocational apprenticeship was designed and planned in terms of the individual workplace (employers and workers participating), whereas the 1969 act brought a more systematic, institutionalized and state-run approach to this aspect of training.

In recent years, the state withdrew the occupational "guillotine" with an act abolishing compulsory retirement (82.2 in Appendix A). The

following year, another act made workers eligible for pensions at age 60 (83.3). Despite an apparent contradiction, these two laws are complementary inasmuch as they increase freedom of choice with regard to active working life. This is a very delicate political question, in which every legislative intervention carries with it considerable social and economic implications. To what extent should the state encourage or cause early retirement of workers? Should the right to work involve a predetermined time limit for all workers?[16]

Group A also includes three laws relating to safety in the workplace (68.5, 75.4 and 79.6 in Appendix A). These laws, passed between 1968 and 1975, make only minor changes to the *Industrial and Commercial Establishments Act* of 1934 (working hours, night work and third shift). These amendments were in no way a forerunner of the radical reform in the *Act Respecting Occupational Health and Safety* of 1979 (79.6), which imposed a totally new approach in this field, especially in the following areas:

- Prevention, on the legal and practical level, ceases to be strictly attached to the issue of the employer's civil liability. Without limitation to the latter, the worker, on these grounds alone, has the right of direct intervention in matters of health and safety in the workplace.
- The function of overseeing preventive measures falls to a public agency, the Workmen's Compensation Commission.
- Workers participate directly in decision-making, either through their representatives in dealing with issues of general interest (prevention programs, training, choice of priorities and directions, etc.), or on an individual basis when this is necessary in order to safeguard their health and physical well-being (refusing hazardous work and protective reassignment).
- Coordination and planning bodies are distinct from collective bargaining systems for working conditions, and work in a general framework articulated to the law and specified by regulation.
- Financing of prevention activities is less directly the responsibility of individual firms: collective distribution of costs, including compensation, is provided by the Workmen's Compensation Commission.[17]

B) Laws Concerning Labour Relations

This group includes 20 laws.[18] Among these laws, six were amendments to the *Labour Relations Act* (44.1 in Appendix A), and were subsequently adapted and incorporated into the new *Labour Code* of 1964 (64.1), which itself underwent two series of major amendments (77.3 and 83.6). On the strictly technical and formal level, the *Labour Code* of 1964 was amended 25 times between 1964 and 1983. Since the code is particularly important in determining the role of the law in labour relations, the principal changes made in the 1944 *Labour Relations Act* should be highlighted.

Just as in the United States and in other provinces in Canada, Quebec's 1944 act imposed a major reform in that it constrained employers to negotiate working conditions collectively with their workers' representative. To this end, a process was established of officially identifying the union empowered to exercise this representation. Beyond this necessary starting point for collective bargaining, the act recognized the legal value of the result contained in an agreement: its effects on the parties and on workers. As regards negotiation, aside from the requirement to act in good faith, the law maintained complete silence: the parties were left to themselves and to their respective persuasive strength. During the 44 years, major amendments to the *Labour Relations Act*, which in 1964 became the *Labour Code*, have been directed primarily toward this crucial phase of negotiation. A brief review of the content of six of these laws shows this clearly:

- *An Act Respecting the Duration of Collective Agreements* (51.1). Duration of collective agreements and possibility of automatic renewal for one year are specified. Such amendments directly affect the rate of negotiation, beyond the respective wishes of the parties involved.
- *An Act to Eliminate Delays in the Settlement of Disputes between Employees and Employers* (52.1). In order to allow negotiation to begin as soon as certification is granted, the legislator attempts to prevent any judicial recourse to scrutinize decisions made by the Labour Relations Commission. The question of limits to judicial intervention in decision-making bodies constituted under the *Labour Code* was returned to in 1982 (82.3).
- *An Act to Amend the Labour Relations Act* (61.2). The act decreed means to ensure reasonable stability in the bargaining process. Certification and the collective agreement remain, even with a change of employer as a result of sale, transfer or assignment of the firm (now s. 45 of the *Labour Code*). Strikes and lockouts are prohibited for the duration of the agreement (now s. 107). Compulsory maintenance of working conditions until right to strike and lockout is acquired (now s. 59).
- *Labour Code* (64.1). Incorporation of all rules relating to collective bargaining into a coherent whole called the *Labour Code*.
- *An Act to Amend the Labour Code . . .* (77.3). A certain decision-making process is imposed on the certified union: secret ballot to decide on strike action or accept a collective agreement (now s-ss. 20.2 and 20.3 of Code). Also, all workers must contribute to financing the union representing them (now s. 47 of Code). In the case of workers negotiating a first agreement, compulsory arbitration is final and may be imposed, thereby putting an end to bargaining (now s-s. 93.1 of Code). In case of a strike or lockout, the employer may not replace absent workers (now s-s. 109.1 of Code). Arbitration of grievances is better defined, and several related matters are resolved by

rule of law, and no longer left to the discretion of the parties (s. 100 ff. of Code).

- *An Act to Amend the Labour Code* (83.6). New rules introduced in 1977 concerning strikebreakers and arbitration of disputes and grievances are corrected to take experience and case law into account. Certification is also made easier by reducing the absolute-majority requirement in certain cirumstances. In two cases, a simple majority may suffice (s-s. 37.1 of Code). This is of course a relaxation of the rules to facilitate certification: in 1944, a 60 percent majority was initially required.

Aside from the many changes that directly affected the collective bargaining process (object, means and effects), other acts brought noticeable alterations to collective labour relations:

- Certification is no longer the responsibility of a tripartite committee, as is still the case in other provinces, but rather of public agents: certification agent, labour commissioner, and Labour Court (69.3 in Appendix A).
- The building sector is excluded from the field of application of the *Labour Code*; a special system was set up for construction, taking trade practices into account (68.4). The latter law marked the beginning of increased state intervention in this sector, to the point where the government used its authority to establish a building contractors' association (76.4).[19]
- The right of association and its exercise in practice are defined in greater detail and protected by scrutiny of the employer's decisions in matters of employee dismissal (59.1) and measures to facilitate use of the *Professional Syndicates Act* (61.1, 72.5 and 76.1).

Whereas in 1944 the *Labour Relations Act* was limited, in sum, to bringing the parties to the bargaining table, the subsequent series of laws gradually amending and complementing the system had the effect of arranging for the presence or entry of the state into collective labour relations. As we will emphasize at the end of our study, these are not simply changes in means, but modifications that affect the very nature of the labour system.

C) Laws of Direct State Intervention in Labour Conflicts and Working Conditions

In this category are found mainly those labour laws through which the state intervenes directly, takes a position, resolves a dispute, or imposes itself in the workplace.[20] We will not analyze each of the 38 laws in detail, but will attempt to highlight certain common features, trends and directions resulting from this particular legislative output.

We should stress the keen interest of the state in the building industry. We have already pointed out that labour relations in this sector were subject to a distinctive legal system (68.4 in Appendix A) and that this compartmentalization even required the creation of a building contractors' association (76.4). Setting up such a separate system of labour relations seems to have provoked or caused a great number of legislative interventions as a result.[21] These laws dealt with setting out the relations between parties and administration of the system (70.3, 72.4, 73.1, 74.2, 74.3, 75.3, 75.6, 75.10, 77.4, 78.7, 80.4 and 83.4); there were also a large number of direct interventions to establish working conditions by law (70.2, 75.5, and decrees of enactment and amendment).

The presence of the state is such a constant and expected factor that it represents a reality, not just a possibility, when the parties develop their respective strategies in negotiating working conditions. The majority of these laws came shortly before or followed closely after the years of renewal of orders-in-council. In addition to regulating the overall framework of labour relations to a high degree, the state involved itself in many other issues concerning the construction sector: vocational training, supervision of qualifications for both workers and contractors, supplemental employee benefit plans, periodic determination of representative unions, manpower quotas, defining of the exclusive vocational field of the sector, classification of activities by trade, etc. This mass of standards is such that it would be difficult to summarize them neatly, and harder still to make them accessible to the uninitiated, even those working in the various construction sectors.[22]

A simple overview of the acts, regulations and orders-in-council relating to construction is enough to convince anyone of the need to lighten the burden, free the industry from a sort of "state guardianship" and deregulate it. Even proponents of the rule of law or of sector-based or multipartite bargaining could not be opposed, so greatly does this legal screen appear to obscure the facts and limit the freedom of movement that parties in other sectors enjoy. The most serious criticism that can be made is of the means used rather than of the objectives sought. The particular labour relations system in this industry, taking into account its special features, has given its workers annual paid leave at year's end and in summer, with no risk of job loss; a supplemental employee benefit and pension plan;[23] and other benefits. Was it necessary to pass so many acts, regulations and orders in order to achieve these results?

The second subgroup of laws includes those setting out minimum working conditions (40.3, 78.5, 79.1 and 79.3 in Appendix A). These establish by law a threshold below which society cannot permit one of its members to work for someone else. This type of intervention, the specific case, is found in every industrialized country. Present minimum standards in Quebec resemble closely those in force in other provinces of Canada.[24]

We have also had, since 1940, a law institutionalizing consultation of the most representative associations of employers and workers: the Superior Labour Council of 1940 was replaced in 1968 by the Advisory Council on Labour and Manpower (40.1 and 68.3 in Appendix A). This approach, perhaps a more European one, nevertheless enabled the Department of Labour to meet regularly with the parties involved to study the implications of new bills.[25]

Of the 38 laws in group C, we should emphasize two that are of special importance, and quite different from each other: the *Charter of the French Language* and the *Act to Establish the Fonds de solidarité des travailleurs du Québec* (77.1 and 83.2 in Appendix A). Under the control of the Quebec Federation of Labour, and with the financial and start-up support of the government, an agency was created to hold workers' savings, and, acting as a screening agency, to enable them to participate as a group to stimulate the economy, maintain or create jobs and contribute to worker training. To the extent that this high-risk enterprise properly achieves its objectives, the view of the parties at the bargaining table should gradually change.[26] For the moment, the fact that this act exists, which is only a response to a union demand, illustrates the partial change in the trade union movement. It is quite possible that this is an effect of the tough lessons in practical economics that workers have had to learn in the past ten years.

The Charter of the French Language (R.S.Q., c. C-11) contains a chapter relating to the language of work. The primacy of French is ensured in three principal situations: communication by the firm with its employees (s. 41); employment (ss. 41, 45 and 46); and acts resulting from collective relations (collective agreement, arbitration awards: ss. 43, 44, 48 and 50). In the last case, there is no requirement for bargaining or arbitration to be conducted in French: only the results must be published in that language.[27] Since it was necessary to end up with an official text in French, negotiators quickly understood that it would be better to start off in French. The approach used certainly appears less coercive and in our view has only increased the effectiveness of this chapter of the Charter.

D) The State as Employer

This category includes 38 laws and encompasses all legislative interventions in which the state, at any level of government, is an employer. They may be broken down into three subcategories:

- Eighteen laws, the main purpose of which is to organize or reorganize the collective bargaining system in various public sectors (44.2, 46.1, 47.2, 60.1, 65.1, 68.1, 69.1, 70.1, 71.1, 74.1, 75.1, 78.3, 78.4, 79.4, 81.1, 81.2, 82.6 and 83.7 in Appendix A);

- Fourteen laws representing specific interventions by the National Assembly to order an end to a work stoppage or ensure the maintenance of public services (67.2, 69.2, 69.6, 72.1, 72.2, 72.3, 75.7, 75.9, 76.3, 79.5, 80.1, 80.3, 82.7 and 83.1);
- Six laws whereby the state directly imposes working conditions in the place and instead of an agreement (67.1, 76.2, 82.4, 82.5, 82.8 and 83.5).

The four workplaces most often targeted by these interventions are school boards, hospitals, the Montreal Urban Community Transit Commission, and Hydro-Québec. A review of the content of these 38 laws and their general references (see Appendix A) leads to the following observations:

- Terms of the collective bargaining system applicable to various public sectors are constantly being revised (18 acts), almost always shortly before or during negotiations for renewal of collective agreements or acts in lieu of agreements.
- Collective bargaining in the public sector from 1974 to 1983 required 22 acts under one of the three subcategories above, including seven for organizing and finalizing the most recent overhaul of working conditions in 1983.[28]
- These acts are so numerous and their respective duration so brief that many provisions disappear before they are enacted, or are not taken into consideration or applied.

It would appear difficult to retain much longer a system in which organization of major services in a society is called into question practically every four years. There is not only the financial and economic aspect, but also the implications of these crises on management of public funds and administration of services, for both those delivering the service (from managers to clerks) and the beneficiaries.[29]

Following the bold act of 1965, in which the state came under the *Labour Code* as an employer (65.1), attempts have increasingly been made to correct legislative sights. It may be necessary to undertake genuine reform in a more methodical, dispassionate manner, with the participation of the parties affected. We might then seek to set aside the 1944 model of negotiation by fits and starts used by private enterprise and adopt a labour relations process suited to the special character of the public sector: continuity of services, public funding, policy framework, etc. The many experiences of other state-employers in organizing their labour relations teach us that this is always a delicate task, with political and social hazards.[30]

The initial review of labour legislation should at this point reveal what employers and unions have asked for during this period and what the political parties offered. This is the issue examined in the following section.

Participants in the Legislative Process

Perhaps more than in other areas, labour laws are never isolated efforts issuing directly from the mere will of the minister responsible or from an abstract view of the workplace. Each legislative intervention produces numerous and sometimes opposite effects on the parties involved and may also affect employment or employers' activity. For these reasons, every law generally results from demands by one or more parties or is intended either as the realization of a commitment made by the political party forming the government or the transposing of a policy. Thus the path followed by a labour act generally covers the following five stages (not necessarily in order):

- demands by unions and employers;
- proposals or counterproposals by political parties;
- the government's legislative program;
- the act as formally adopted;
- actual effects of the act.

Of course, amendments to labour acts made to complement the law, limit its scope or correct a mistake result from and follow this procedure.

The legislator's work in the labour area cannot be examined or appraised without considering the ins and outs of such legislation. Any law may itself be the result, the complement, a reaction or counterreaction to preceding legislation. For many reasons, there may also be discrepancies, even a considerable gulf, between the various stages: thought may be in absolute terms, while action is based on relative terms. To illustrate, we might cite well-known cases where:

- unions have asked for a law without considering the implications it might have for other groups of workers in a different situation;
- employers have opposed a bill in the name of free enterprise and freedom of the individual, while at the same time seeking protection, assistance or support from the government (in the form of subsidies, tax credits, embargoes, wage controls, etc.) and dictating working conditions for their workers;
- political parties have proposed major reforms in labour, without assessing beforehand the practical implications of such proposals and without achieving them completely;
- a government openly announced the forthcoming adoption of a labour law, but that law is still forthcoming, or its content has been watered down;
- the courts have declared that a given labour law does not contain exactly what was expected or hoped for.

Our objective would be to find and recognize these discrepancies between talk and action, and in this way to discover the role that the law was actually intended to play with respect to labour, for employers,

unions, and political parties on either side of the National Assembly. Such a critical summary, however, is far beyond our means, and so our analysis will be more limited in scope. We will first consider the positions of the major trade union federations and employers' associations on a number of key issues. We will then study the proposals made by political parties. We will next analyze critically the labour laws actually passed and their real scope, both immediately and in the longer term. Because we are giving only examples of union and management demands and political parties' proposals, we cannot, in the end, establish a direct, accurate relationship between demands and offers on the one hand and the true scope of present labour legislation on the other. The critical analysis we will make of these laws does, however, reveal these relationships to some extent.

Taking into account the economic and legal system, it is understandable that the trade union movement, which itself arose out of industrialization, played a contestatory role with both employers and legislators. Experience since 1940 indicates that, as a general rule, these demands, claims or victories were directed more toward obtaining adjustments and corrective or preventive action, than toward radical change. It also stood to reason that workers and their collective bodies, i.e., unions, acted on both fronts at once, that is, with employers and with the legislator. To some demands, employers could not really offer a satisfactory reply; to others, they simply refused.[31] Thus reports of union federation conventions abound with demands for legislative intervention.[32] Concurrently, and sometimes in response to the unions, employers also make known their positions and demands, through their own channels. Because the economic and legal system favours them, the employers' approach is, as a general rule, more conservative, and they wish to maintain the status quo.

Political parties cannot remain passive to representations from unions and employers. They attempt to take positions, formulate proposals, and satisfy — or try to satisfy — one group or win it over, if possible without driving away other groups. The process is effective and vigorous: it may be sparked by agents who are sometimes both employers or union members and party workers. Parties' positions are often included in their official programs, so as to be publicized to target audiences. Such programs may subsequently constitute, either wholly or partly, the government's working plan. In all these interconnected phases, we are dealing with the state's desired — or deplored — legislative intervention.

Demands for and offers of legislative intervention bear on innumerable questions. Listing them would hardly serve our purpose — looking at both the role of the law in labour and the role intended for it by the parties involved. In this framework, we will first consider certain demands by employers and by union federations, and then look at

proposals by political parties. We repeat that we cannot make a full, systematic analysis of union and employer demands: we will simply give several illustrations drawn from limited or inaccessible sources of information.

Demands by Parties

We will consider the demands or positions of unions and employers only from the point of view of several particular issues: strikebreakers; multipartite or sector-based bargaining; the occupational health and safety system; collective dismissals; maintenance of essential services; and manpower. These six issues have aroused debate for many years. They will serve as a context for the analysis of labour laws presented in the following section.

Strikebreakers

In order to limit picket lines and thereby reduce opportunities for conflict outside workplaces, unions have proposed that positions left vacant by striking or locked-out workers may not be temporarily assigned to other workers. It is thus assumed that surveillance of the workplace by picketers will be less necessary, without reducing the effectiveness of the strike. The question may be asked regarding the extent to which both parties share this assumption, and the required strictness of such a prohibition on the use of third parties to achieve desired objectives. This proposal also raises the delicate issue of the limits of state intervention in such situations. Does this intervention infringe upon the free exercise of pressure tactics or the full use by both sides of their respective rights and resources? The proposal implies a temporary limit on certain of the employer's prerogatives (ownership, entrepreneurial and contractual freedom) as understood in their traditional sense, in order to acknowledge a sort of "ownership" of their jobs by striking or locked-out workers. It is understandable that union and employer positions were quite opposite at the time, as illustrated by the following excerpts:

Quebec Federation of Labour (QFL):

> The principal attack against the right to strike is the employer's privilege of replacing striking workers with new employees and carrying on activities during the conflict. The hiring of scabs or strikebreakers is the main cause of violence in labour conflicts, and contributes to drawing out the conflict and causing it to deteriorate. The most elementary logic and justice dictates that the law formally prohibit an employer from replacing striking employees.[33] [Translation]

Conseil du patronat du Québec (CPQ), Quebec's major employer group:

With the tabling of Bill 45 in 1977, the CPQ expressed its basic objections to the fact that an enterprise may, for all practical purposes, be forced to suspend all production of goods or services for the duration of any strike that may occur in its establishment . . .[34]

Any amendment to the *Labour Code* to prevent an employer from hiring staff during a strike would be an irreparable blow to his strict right to continue operating his business as best he can, and at the same time an unfortunate legislative precedent likely to harm those small and medium-sized enterprises the act presumes to be helping.[35] [Translation]

Sector-based Negotiation and Multipartite Certification

Because our exclusive system of collective labour relations is set up on the basis of the individual enterprise, the trade union movement feels that this is the main brake on its expansion (60 to 70 percent of employees are not governed by a collective agreement). The argument is made that if it were possible to establish multipartite negotiation or negotiation for an activity subsector (shopping centre, groceries in a given city, stationery stores in a given region, and so on), unionization would increase and the collective rights of a large number of employees could be exercised. The stakes are high for both employers and unions. There are two issues involved: unionization, and a new area of negotiation. All these proposals imply the advent of a new law.

Conseil des syndicats démocratiques (CSD), one of four major labour federations in Quebec:

The CSD reiterates its principal position in this regard: acknowledgment and implementation of a "neighbourhood trade unionism" ["syndicalisme de quartier"] that would take two special but complementary forms:

- Amending the *Act Respecting Labour Standards* so as to recognize the right of non-union workers to defend their own interests. Exercise of this right means the right to lodge a grievance and take it to arbitration under the provisions of the *Labour Code*, and to be represented in the enterprise and in arbitration by a union representative of the worker's choice, with the costs in connection with such representation to be assumed by the Labour Standards Commission;
- Amending the *Labour Code* to enable workers in small and medium-sized businesses to unionize on the basis of multiple certification, namely through granting of certification for a shopping centre or a group of merchants in a neighbourhood or a number of similar businesses.[36] [Translation]

QFL:

Because of outdated legislation, nearly two-thirds of workers have no access to unionization. They are thereby deprived of a collective instrument for defending their interests that would enable them to exercise the rights

formally acknowledged to them in law, such as occupational health and safety, or minimum wage. We feel that an in-depth reform of our laws will allow multiemployer certification and negotiation. Access to unionization is a priority for the QFL.[37] [Translation]

CPQ:

"When the economy's working, everything's working!" Sector-based negotiation, in the long term, means *compulsory unionization, monopolization of union power, politicization followed by centralization of labour relations*, all of which blocks the normal functioning of a market economy. And it has been proven historically that only a market economy has the effect of making a real and permanent improvement in the standard of living and quality of life of the whole of society. The legislator's duty is to see that favourable conditions are maintained for free economic activity. Laws imposing sector-based negotiation would point us in a diametrically opposite direction.[38] [Translation]

Occupational Health and Safety

The need for an overhaul of active prevention was agreed to unanimously by the parties. Discussion centred more on the means, the rate of change and application of the new policy:

QFL:

There is no possible solution to problems of occupational health and safety unless the state clearly acknowledges the primary, collective responsibility of workers in this matter. It is workers who are victims of accidents and occupational diseases: they must be given the resources and the power to have their basic right to health respected.[39] [Translation]

Proposals at labour conventions are often preceded by a number of fairly revealing "whereas" clauses: "Whereas commitments in this respect have been made by members of the government at the recent QFL symposium . . . [Translation]"[40]

Confederation of National Trade Unions (CNTU):

The philosophy underlying most of the policies stated in the white paper consists of preaching cooperation between workers and employers on joint, or parity, committees. In our view, the issue of workers' health and safety should be the business of workers themselves and their organization to defend their interests. While the approach of the white paper is individualist, our approach is collective. The role and place of unions are not acknowledged in the white paper.[41] [Translation]

This position of principle required in particular:

The right of the worker or the union on the worker's behalf to refuse to work in conditions which the worker or the union deems hazardous to the health

and safety of the worker or of co-workers, without penalty; failure by the employer to observe standards, acts or regulations shall also give rise to this right.[42]

The union's right to investigate, in any place and at any time, any matter relating to occupational health and safety, using any necessary measuring apparatus, independent of the employer.[43]

The worker's right to the physician of his or her choice and to payment of compensation on the basis of the physician's diagnosis, and consequently the right to refuse examination by physicians and the Workmen's Compensation Commission.[44]

CPQ:

. . . while expressing our agreement with the principles and the logical basis of the reform contemplated, we:

a) indicated our disagreement with several of the means proposed to achieve the objectives of the reform;
b) stated our rejection of the excessive dilution of the employer's responsibility with regard to occupational safety and accident prevention expressed in the white paper;
c) made a number of proposals intended, on the one hand, to confirm the enterprise in its role of being truly and ultimately responsible for the planning and organization of occupational health and safety, and on the other hand, ensuring that the contemplated reform does not impose unacceptable restrictions on the enterprise.[45] [Translation]

Collective Dismissal

While sometimes an unavoidable solution, for economic and technological reasons, collective dismissals of workers are always a delicate matter, with serious social and economic implications. The harsh reality of collective dismissals produces manifold effects: for the workers, personal catastrophe; for the union, disruption; for the government, an additional burden; and for the employer, a "market imperative." In the case of technological change, such dismissals are certainly foreseeable, but in other cases this is not always so. If employers are to retain this prerogative, should they pay the costs, and, if so, which costs?

QFL:

Be it resolved that the *Labour Code* be amended so that in the event of a plant shutdown, the employer must give one year's notice and no employee may be laid off within that year, and so that the company assumes the social cost involved;

Be it also resolved that in order to avoid possible shutdowns, legislation be passed to the effect that companies be required to reinvest a portion of their profits in the plant, so as to keep the facilities in the forefront of modern technology.[46] [Translation]

CNTU:

> There is no law requiring employers to inform workers on all matters concerning the firm. No agency is provided to stop shutdowns or dismissals, examine their appropriateness, propose rectification plans, contemplate alternative solutions, or maintain workers' jobs. Existing forms of advance notice are far from adequate. No guarantee is provided to maintain their income in case of definitive dismissal so that they can meet their family and social responsibilities.[47]
>
> A job stabilization fund that would be: a) an agency to prevent plant shutdowns: . . . b) a general compensation fund financed by employers to ensure workers their due in case of bankruptcy: . . .[48] [Translation]

CPQ:

> With respect to this problem, it should first be recognized that no industrial society acknowledging its citizens' real freedom to act in their economic life can have effective mechanisms available in all cases to avoid collective dismissals or offset their effects through automatic reclassification of workers. Assistance programs applicable to cases where collective dismissals are economically caused, properly speaking — shutdown of an unprofitable plant, for example — should have two objectives: first, to protect the workers' interests at the time of dismissal (notice, back pay, various bonuses under the collective agreement, etc.); and second, to assist workers in finding new employment.[49] [Translation]

Essential Services

Ever since the time of the first collective bargaining for workers in the public service, the state has intervened to prohibit or limit the exercise of the right to strike. How to ensure the maintenance of essential services and how to define the irreducible limit of these services was the twofold question facing workers, users of the services, unions, managers and the state. Because the labour relations system in the public sector is often assessed in terms of the private sector, conclusions of those observers are often diametrically opposed. The debate has two other important elements: users of services are also taxpayers and voters, and the employer in this case is also the legislator. In this sense, the situation is totally confused, as illustrated by the following excerpts from various observers on the role of the law:

QFL:

> The QFL acknowledges that workers have social responsibilities in the exercise of their collective rights. The issue of maintaining essential services during labour conflicts in the public sector should not be likened to any other disruption in the normal operation of institutions. Abuses of interpretation in this sense by legislators and courts have slowly discredited the laws in workers' eyes.

We are asking that essential services be subject to negotiation between the parties involved. If there is no agreement, a mediator should intervene in the thirty days preceding the strike date, and should subsequently make a public recommendation to the parties.[50] [Translation]

CPQ:

Experience has largely shown that a solution to the impasse in public sector negotiations, with its increasingly intolerable consequences, does not lie in a complete restructuring of bargaining mechanisms applicable to the public sector. It is no longer possible to simply fine-tune the mechanisms of a *Labour* Code that was designed to serve other purposes, i.e., union-management relations in the private sector.

The legislator should create a Labour Code for the public sector that takes its special characteristics into account.[51]

In any civilized society, citizens should not be deprived of what are deemed essential services.

In this context, the CPQ, in November 1982, asked for the outright withdrawal of the right to strike in certain sectors where the public could not tolerate even a temporary suspension of services to users: health sector; electrical, natural gas and drinking water supplies.

We urge the legislature to act on this request.[52] [Translation]

Even in 1973, while union federations and employers were agreeing on the broad outlines of a new system, the maintenance of essential services was still a contentious issue:

According to management arguments, unless the terms of a third-party report or an agreement between the parties are accepted and properly observed, a board or ad hoc court could intervene immediately. The decisions of this public body would have force of law; both parties and any worker or employer's representative would be bound to obey them. The board or court could be made up of individuals qualified in this area, and would have the resources to respond effectively to problems submitted to it. By so doing, the parties would no longer be able to resort so easily and quickly to the usual procedure, i.e., a Superior Court injunction. The board or court could also intervene at the onset of a strike or lock-out, or when informed of one, as the case may be, in order to remedy any shortcomings in the initial third-party report. Any intervention during a strike or lock-out should also be under the control of the board or court. In the opinion of the union group, intervention should be limited to that of the third party alone, appointed by the parties or, when there is no agreement, by the minister responsible, and to publication of the third party's reports. The third party should take action before the strike or lock-out and, if intervention is necessary, again during the strike or lock-out. This mechanism should constitute a sufficiently effective means so as not to require additional legal constraints. For the rest, the many forms of pressure that may normally be exerted on the parties should leave each of them free to make the most appropriate short- and medium-term decisions.[53] [Translation]

Manpower

Except for the *Manpower Vocational Training and Qualification Act* (69.5 in Appendix A), the state has not intervened through legislation in the field of manpower. This does not mean, however, that there have been no requests for it to do so. Annual reports of the Advisory Council on Labour and Manpower (ACLM) describe numerous debates on the subject, often the result of announcement of a forthcoming intervention by the government. The 1981–82 report summarizes the situation of union federations, employer associations and the government:

> The ACLM has reiterated a number of times since 1969 to successive ministers who have headed the Labour and Manpower Department the importance of Quebec's adopting a manpower policy.
>
> At a special session of the ACLM on June 26, 1981, the Minister of Labour, Manpower and Income Security described for council members the major manpower-related issues upon which the minister was contemplating action in the coming four years:
>
> - integration of social assistance and manpower branches and systems;
> - development of a rehabilitation policy for employable workers;
> - protection of jobs against dismissal as a result of plant shutdowns;
> - a job program for young graduates;
> - job security for pregnant women workers;
> - a federal-provincial agreement on adult vocational training;
> - creation of a mining fund.
>
> Although the Advisory Council has been kept informed, it has not been consulted to date on the directions of these various issues.[54] [Translation]

We have presented herein only a few of the demands for legislative intervention from union and management on six issues in particular. It is clear that, given the nature of the changes asked for, neither a union nor an employer could directly achieve such projects, and that legislation represents the appropriate path. We are stressing the large number of issues on which the parties, through their regular, emphatic solicitations, wish to see legislative intervention.[55]

Responses from Political Parties

It may be of interest to examine what political parties were offering labour during this period in response to demands from unions and employers. To a certain extent, the policy programs offer what political parties feel the voters want. The content of such programs may vary considerably according to target audiences selected (subsets), and there is always a discrepancy between the program concept and its execution (one being abstract, the other concrete). This is more revealing, we feel, of the parties' perceptions at a given moment, and incidentally of the role attributed to the law in this area and the role it is called upon to play with

the public (the mythic effect of the law). We do not wish to imply a direct cause-and-effect relationship between these programs and specific demands made by unions and employers. No political party would openly run the risk of taking one side and completely ignoring the other.[56]

Eighteen programs have been published since 1960. Prior to that time, parties seem to have made little or no use of this means of publicizing their policy directions. Their plans were learned about piecemeal, through speeches. These 18 programs are broken down by political party as follows: seven by the Liberal party, seven by the Union nationale, in 1960, 1962, 1970, 1973, 1976 and 1981; four by the Parti québécois (1970, 1973, 1976 and 1981).

We will summarize these programs by means of several excerpts, so as to highlight the key concepts in labour.

In 1960, the Liberal party's labour program included six components: enactment of a Labour Code; creation of labour tribunals; reform of the *Workmen's Compensation Act*; reform of the Minimum Wage Commission; publication of decisions of the Labour Relations Commission; and creation of a pension fund. The party then in power, the Union nationale, summarized its activity in an advertising insert:

> Harmonious worker-management relations: The *Labour Relations Act* was amended in the last session of the Assembly to strengthen the right of association, establish parity in the Labour Relations Commission, expedite matters in dispute, provide harsher penalties for violations of freedom of association or the right to bargain collectively, or any other failure to obey the Commission's decisions. The *Workmen's Compensation Act* has become the most generous in Canada in the course of the second session, thanks to intervention by the Honourable Antonio Barrette; the act grants more protection to widows and orphans of accident victims, particularly to large families.[57] [Translation]

The 1962 Liberal party program reiterated the 1960 position. Nationalization of electricity was the key issue at the time. The Union nationale published a seven-point program:

> Minimum wage of $1.00 an hour, creation of a universal, portable pension, an end to discrimination against female employees, unemployment insurance for seasonal government workers, right of association and bargaining for provincial government employees, amendment of the Workmen's Compensation Act to expedite procedures and provide benefits better adjusted to the cost of living, and fighting unemployment. [Translation]

The 1966 Liberal party program, using the theme "Québec en marche" ["Quebec on the Move"], included a section titled "Labour," with the following seven points:

> Creation of a department of labour and manpower; establishment of manpower mobility bonuses and allowances; minimum wage raised to $1.25 an

hour by 1968; normal work week reduced gradually from 48 to 40 hours; two weeks' paid annual vacation after one year of service, three weeks after five years; application of equal pay for equal work principle; and establishment of maternity leave without loss of acquired rights. [Translation]

The Union nationale, for its part, stated its objectives in 1966 for a "Jeune nation, Québec d'abord" ["Young Nation, Quebec First"]:

1) To relieve unemployment, the UN recommends:
- a department of planning;
- an employment council;
- job insurance;
- an automation board.

2) To promote better relations between workers and management: a new *Labour Code*, with the right to strike even during the life of a collective agreement, and creation of a tripartite inquiry and conciliation commission. [Translation]

In 1970, using the theme "Québec au travail" [Quebec on the Job], the Liberal party proposed:

An inventory of available manpower and job outlook by region; closer coordination between education and the job market; immediate introduction of permanent negotiating mechanisms in the public and private sectors; incorporation of government wage policy into an overall income policy, in cooperation with union and employer associations; creation of a permanent income commission, constituted as a priority; administrative reorganization of the Minimum Wage Commission; creation of a permanent research and training centre in the Department of Labour; introduction of maternity leave. [Translation]

At the same time, the Union nationale announced a program that was just as ambitious:

1) Drawing up a qualitative and quantitative manpower inventory;
2) Continuing review of the legislation, in order to adapt it to new labour market conditions in the following areas: technical services, minimum wage, collective agreements, employment offices, professional unions, ending job discrimination by establishing wage parity between men and women, advance notice of collective dismissals, accidents, and extending the act to isolated workers. [Translation]

In addition, under the subtheme of "Education and Jobs," the party promised:

In cooperation with industry, organizing trade, public services and union federations, practical apprenticeships for secondary school and college graduates, and . . .

3) Stepping up continuing education programs required for training and retraining adult workers, in cooperation with employer authorities and labour movements. [Translation]

Under the title of "La Solution," the Parti québécois program offered various proposals aimed at enabling all workers to join a union, ensuring a democratic Quebec trade union movement, the shelving of shop unions, and preparing for the future, i.e.:

> Maintaining a permanent, detailed inventory of available manpower and of the school population, indicating the composition of that population and its probable directions. [Translation]

The 1973 New Action Program of the Quebec Liberal party included the following headings:

- Changing the name of manpower centres to Québec-Travail [Labour Quebec];
- Amending the *Manpower Vocational Training and Qualification Act*;
- Amending the Act respecting private employment bureaus;
- Amending the *Labour Code* with respect to certification, negotiation, collective agreements, and arbitration of grievances;
- Use of the French language in negotiation and arbitration, and in actions brought by the Quebec Attorney General;
- Collective bargaining in the public and parapublic sector;
- Occupational safety, a charter of human rights, and French as the language of work. [Translation]

The Union nationale, under the general heading of "Un instant! . . . pour l'avenir d'un Québec fort" [Just a minute! . . . for a strong Quebec future], proposed:

> . . . creation of a national coordinating agency, to be called the *Conseil économique et social*, with representation by the government, employers, and workers, and where regional representation would be taken into account. [Translation]

On the subject of labour relations, there were 16 motions, including particularly the creation of an independent, permanent agency to be called the Conseil national du travail (National Labour Council), implementation of a true labour court, creation of a permanent study and advisory body on industrial relations, establishment of negotiations in the public sector, within a stable framework, and a wage policy to permit low wage earners in the public and parapublic sectors to catch up, over a period of three years. The Union nationale committed itself to delaying use of the right to strike in the public sector, developing a new formula for deciding on essential services, putting negotiation structures in place that correspond to industrial structures in Quebec, guaranteeing representation by workers on the Workmen's Compensation Commission, formulating a genuine manpower policy in the construction industry, and adopting a law requiring union federations to produce an annual report and a detailed statement of their income and expenses for the fiscal year.

The Parti québécois program included a chapter on working conditions which proposed in particular:

- Raising the minimum wage to $2.50 an hour;
- Setting the normal work week at 40 hours;
- Limiting overtime to 8 hours per week;
- Retirement optional at age 55;
- Protecting occupational health and safety;
- Establishing a single network of manpower centres;
- Seeing that any worker on extended unemployment or required to change jobs has access to courses free of charge and receives adequate financial assistance;
- Seeing that decisions by companies affecting technological change take into account the rights of workers in each sector;
- Conferring application of legislation affecting working conditions on tripartite committees;
- Recognizing the trade union movement as a normal, indispensable element in the social, economic and political life of Quebec;
- Facilitating membership by all employees in the union organization of their choice;
- Ensuring that every union member is able to demand observance of union democracy;
- Encouraging and promoting negotiation by sector, with tripartite participation;
- Promoting, in law and in practice, the development of democratic forms of management, so that workers exercise jurisdiction, in whole or in part, over the operation of their enterprise.

The Liberal party stated its 1976 program in this way:

- Advancing various ways of avoiding strikes in the public sector, and preventive mediation in the private sector;
- Job enhancement;
- Occupational health and safety, and workers' health;
- A manpower policy that breaks down the barriers between school and working life, by improving training programs in firms, reorienting employment and manpower policy toward job enrichment, etc. [Translation]

That same year, the Union nationale, under the title "C'est le temps de mettre de l'ordre dans les relations de travail" ["Time to put some order in labour relations"], recommended:

- Taking workers out of the role of instrument, a role imposed on them by the Labour Code;
- That workers, employers and governments together assume their social responsibility in true partnership;

- Replacing the right to strike in the public sector by permanent negotiations;
- Completely revising the *Labour Code*;
- Setting up true labour courts;
- Making democratic, responsible unions accessible to all workers;
- Subjecting exercise of the right to strike to a majority vote of all employees belonging to the bargaining unit;
- Revising the *Workmen's Compensation Act*. [Translation]

The Parti québécois, for its part, reiterated its 1973 position in further detail.

Under the title "La société libérale de demain" ["The Liberal society of tomorrow"], the Liberal Party's New Action Program in 1981 stated the following:

> To see that the Advisory Council is more representative in its makeup and is encouraged to take the initiative in labour matters; to show more concern for the working conditions of non-union workers; to examine the practical implications of the Act respecting occupational health and safety in terms of costs and the creation of bureaucratic mechanisms at all levels; to create a task force with a mandate to examine both overall problems in connection with labour relations, paying special attention to action required to promote true union democracy, and aspects such as administration of the labour relations system, injunctions, and technological change; lastly, decentralization of relations between the government and legal entities, education and social affairs systems, and government agencies. [Translation]

The Union nationale proposed in particular the development of a comprehensive manpower policy, setting up a human resources department, creating a student manpower planning branch, prohibiting the right to strike in the health, education, and public safety sectors; negotiating an acceptable alternative solution with union and management partners in the public and parapublic sectors; creating a commission of inquiry to conduct an in-depth review of the *Labour Code*; and ensuring that the financial statements of union federations — intermediate public bodies — be widely distributed and accessible to members at all levels.

The Parti québécois official program, published in 1980, included two quite substantial chapters: Chapter V, on working conditions, was made up of 20 sections dealing respectively with separate points already achieved, to be achieved, or to be completed; Chapter VI, on labour relations, was divided into 15 sections, including this preamble:

> The regulation of working conditions is only a first step toward the collective freedom of workers, but runs the risk of becoming inoperative if workers cannot organize to defend their own rights. Sixty to seventy percent of workers in Quebec are ununionized, and traditional certification procedures have for a long time made the exercise of freedom of association an illusion for this majority. Also, governments have long denied in practice rights

already given the trade union movement in law, thereby altering the rules of the collective bargaining game in favour of the employer. We must put an end to this situation, and promote the growth of a dynamic trade union movement in Quebec, a movement which, beyond its purely contestatory role, will become an instrument for responsible participation by workers in decisions which affect them at all levels. [Translation]

General Observations

These 18 programs, as the excerpts above seek to illustrate, contain innumerable proposals for solutions to problems raised by labour relations. Simply reading these programs quickly reveals a sometimes considerable gap between the basic philosophy of the political party and the style, structure, wording and proposed policy directions. We also noted that opposition parties are generally more outspoken, more generous, and especially bolder than the party in power. In sum, they appear to be attracting voters by offering legislative proposals they feel the voters want. Such proposals consist mainly, if not exclusively, of legislative interventions, showing clearly the importance given the law, or at least the importance the law is felt to possess in this area.

More particularly, these excerpts from party programs enable the following observations to be made:

1. Reform of the *Labour Code* seems to be espoused by the Liberal party in 1973 and 1981; by the Union nationale in 1966, 1976 and 1981; and by the Parti québécois in 1973, 1976 and 1980. Unlike the Parti québécois, the other two parties do not specify the policy direction, objectives or depth of the reform.
2. Manpower inventory also appears as a major bill espoused in 1970 by the Liberals, the Union nationale and the Parti québécois. After a number of trials during the 1970s, political strategy seems to have sidestepped this enormous, almost unachievable bill, the practical utility of which was scarcely proved.
3. Reform of the *Workmen's Compensation Act* has always been espoused by all parties as being "self-evident."
4. Democratization of unions through legislative provisions is a theme used by the Union nationale in 1970, 1973, 1976 and 1981; by the Parti québécois in 1973, 1976 and 1980; and by the Liberal party in 1981.
5. Tripartism, or joint consultation by employers, unions and government, is one of the themes taken up by all three political parties. Thus, the Union nationale, in 1973, suggested creation of an economic and social council, while the Parti québécois recommended formation of a tripartite committee to ensure the application of labour standards. In 1981, the Liberal party proposed leaving more initiative to the Advisory Council on Labour and Manpower.

We have also attempted to determine the target audiences of these

programs. This seems to vary with time period and economic situation, rather than with political party. Generally speaking, themes deal more directly with the individual worker and, less often, or fairly seldom, with workers as a group or with unions. This is true in dealing with benefits for industrial accident victims and the minimum wage. As an exception, Parti québécois programs contain several specific bills largely desired by the unions: easier access to unionization, bargaining by sector, mining fund, etc. Programs concerning labour relations in the public sector aim more to reassure the public, users of the services, than to please the employees concerned. Less emphasis seems to be placed on means, and more on objectives.

Most major bills proposed by the political parties were achieved, although often following a non-linear path. Quite often, this happened under a government led by a party other than the initiator of the bill. In the majority of cases, the laws were passed long after appearance of the motion in party programs; reform of minimum working conditions, announced in 1966 by the Liberals, was achieved in 1979 by the Parti québécois.

Finally, we should emphasize a number of motions that have not yet taken the form of legislation, concerning the mining fund, permanent negotiations in the public sector, the national social and economic council, general unionization, and collective dismissals.

These few excerpts, while illustrating the content of political programs, do not sufficiently indicate how the state intended to use legislation to intervene in labour matters. In this sense, the many Speeches from the Throne, written under the hand of the government, that is, of the premier and leader of the party forming a majority in the National Assembly, give an interesting idea of the role of legislation in this field.

The Speech from the Throne, or Inaugural Message

According to parliamentary practice, the government, at the opening of every session, makes a statement of the program it intends to submit to the National Assembly. This statement conveys the government's plan of action, and consequently that of the party in power. The electioneering character of the speech may be more marked near the end of a government's term of office, and the same is often true of the first Throne speech after a government has taken power. Generally speaking, the wording is somewhat more restrained in Throne speeches than in the party's election program.

It is impossible to summarize Speeches from the Throne (the name "Discours du Trône" was later changed to "Discours inaugural" [Inaugural Speech] and then to "Message inaugural" [Inaugural Message]) of the 52 Assembly sessions since the twenty-first legislature of 1940 up to the thirty-second legislature. We were able to list only 15 Inaugural

Messages where no labour legislation was announced; in three other cases, there was no Inaugural Message, because of the special nature of the session. A reading of the remaining 34 Inaugural Messages (found in the *Journal des débats*) reveals, by way of illustration, the following passages dealing with labour:

1940: We are presenting a Minimum Wage Act to replace the present *Fair Wage Act*. This act will serve to complement the *Collective Agreement Act*, which will be examined by a committee with a view to making the desired amendments. We will strengthen our social legislation by establishing a Superior Labour Council, similar to those which have played such a beneficial role in Europe.[58] [Translation]

1943: In its concern to improve the lot of the working class, my government will ask you to broaden the provisions relating to occupational diseases.[59] [Translation]

1944: As legislation is a matter of prime concern, my government proposes to create a Labour Relations Commission.[60] [Translation]

1949: A *Labour Code* bill will be submitted to you, and my government will welcome with pleasure any constructive suggestions that may be made, for it wishes the province to have the best Labour Code possible, respecting the rights of the individual and safeguarding the rights of the public, that is to say, the common good.[61] [Translation]

1953–54: Laws will be submitted to you having the object and effect of promoting essential cooperation between employee and employer, and respecting the rights and obligations of each.[62] [Translation]

1961–62: It will be your duty to study measures that will assist the working class, in particular amendments to the Workmen's Compensation Act.[63] [Translation]

1963: . . . you will be called upon to study a bill concerning labour relations, prepared in light of the recommendations of the Superior Labour Council.[64] [Translation]

1964: The government intends to introduce several new legislative measures in the interest of the working classes . . .[65]

1966: In the field of labour, the government intends to exercise its jurisdiction more fully through a vigorous work-force policy. In particular, it will encourage measures to supply our industry with qualified workmen and also to take the necessary steps to offset the consequences of automation, especially through the reclassification of workers.[66]

1966–67: There will be amendments to the *Labour Code* and to other labour laws, designed to prevent disputes by taking action at the outset on the causes liable to provoke them.[67]

1968: The government will propose to you certain amendments to

the *Labour Code* designed to facilitate the just settlement of disputes in good faith and harmony.[68]

1973: In the complex field of labour relations, you will be called upon to study bills concerning the welfare of the general population in case of a labour conflict.[69] [Translation]

1973: You will also be called upon to re-evaluate our labour relations legislation in both the private and the public sector.[70] [Translation]

1974: The government will present a framework bill having the effect of reorganizing and updating five acts previously passed by this Legislature concerning the safety of workers and of public places.[71] [Translation]

1975: As a result of recommendations made by a special task force to examine management of the minimum wage, the government proposes to establish and put into force components of a major comprehensive policy on minimum working conditions.[72] [Translation]

1976: The definition and implementation of a policy of occupational medicine and health and hygiene in the workplace, in particular in the field of asbestos, are a priority . . .

In the field of labour and manpower, the government will take action on its bill to modernize the *Workmen's Compensation Act* by proposing a bill to redefine the powers and functions of the Workmen's Compensation Commission. The government will submit to you as well the adoption of an act on the guaranteeing of general working conditions.

The government invites you to amend the *Labour Code* so as to take into account the advice of the Advisory Council on Labour and Manpower and the experience already gained in this area.[73] [Translation]

1977: We will no doubt be required, within a short time, to make in-depth changes in the *Labour Code*.[74] [Translation]

1978: . . . we fully expect, on the other hand, to arrive at a comprehensive act to encompass the vital questions that have been raised for so long, and in such disjointed fashion, on the health and safety of workers. In the quite near future, there will be proposed a new definition of minimum working conditions.[75] [Translation]

1979: Concerning the maintenance of a good social climate, which is indispensable to any progress worthy of the name, all workers will be called upon in 1979 to exercise important new responsibilities under the Act respecting occupational health and safety . . .

For the vast majority of non-unionized workers, including many women who aspire to no less than decent working condi-

tions, we will also ask you to be prompt in pursuing the study of a bill on minimum standards that will respond to these pressing needs.[76] [Translation]

1980: We will also propose the adoption of a new compensation plan for occupational accident victims that will approach the system in place for automobile accident victims. . . .
We will also proceed with the establishment of a Mining Fund that will guarantee a degree of financial security for mine workers . . . This new act will open the door to an improved job security plan by virtue of an act on collective dismissals.[77] [Translation]

1981: As regards the second of the commitments which we wish to act upon immediately, it is to abolish the compulsory retirement faced by many workers even though they have the desire and the ability to continue working . . . This, of course, will require a change in our way of thinking and in working conditions, and the change will not be achieved overnight; the act to be presented to you will, however, be a significant first step in this direction.[78] [Translation]

1981: In labour relations, there will first of all be important amendments to the *Labour Code*. Without overturning the general economy of the act, these amendments are aimed primarily at removing for good these obstacles, hindrances and slowdowns . . .[79] [Translation]

1983: The *Labour Code*, for one, is no longer suited to the context in which we live, and needs to be amended. Initially, that is to say, by this summer, in consultation with the parties concerned, the Minister of Labour will present the most urgent amendments.[80] [Translation]

These excerpts illustrate, in our view, the relative importance given by governments to labour issues. The tone and particularly the content of these speeches are less bold and ambitious than the party's platform. The same holds true for all parties and all governments examined. Major bills are often announced before they are completed. This was the case for:

- *Labour Code*: The Union nationale announced development as early as 1940, and the bill was sent for further study by the Liberal party in 1963 and 1964. Amendments to the Code were announced in several inaugural messages: 1966–67 and 1968 (UN); 1973 (Liberals); 1976, 1977 and 1983 (PQ).
- Minimum working conditions: An important reform was first undertaken in 1940 (Liberals); corrections were made in 1975 (Liberals) and 1978 (PQ), before a major change was made in 1979 (by the PQ).
- Accident prevention and compensation: Corrections were announced in 1943 (Liberals), 1961–62 (Liberals) and 1968 (UN). In 1974, the

Liberal government announced a more consistent and complete framework law; the bill was promised again in 1978 and achieved in 1979 by the PQ.

This brief overview of successive announcements of legislative bills reveals that several of them originated under the leadership of one political party and were taken up — and often realized — under the leadership of another party. This is particularly the case of the *Act Respecting Occupational Health and Safety* and the *Act Respecting Labour Standards*. These two acts saw the light of day in 1979, under a Parti québécois government, although work on them had begun in 1974 and 1975, under the Liberals. The same was true in 1960, when a bill to amend the *Act Respecting Labour Standards* prepared by the Union nationale was taken up by the Liberal party. The process was repeated in 1977, with major amendments to the *Labour Code* that had been announced by the Liberals in 1975–76. This continuity throughout changes of government may result from the fact that demands from the labour community remain constant, or from the fact that files set up by civil servants on the issue were simply put unchanged on the table of the new minister. No Inaugural Speech, however, has announced an act providing the means to achieve the monumental project of taking inventory of manpower resources, even though every party has committed itself to the idea in its program. Bills in this field (in 1966, 1968, 1973 and 1976) have been much more modest in scope, confining themselves to training and terms of employee dismissal.

A reading of Inaugural Messages permits other observations to be made:

- The approach to labour issues has changed considerably over the past 44 years: the tone has become gradually less paternalistic, and the issues are approached from a more technical standpoint.
- The announcement of forthcoming legislative intervention is surrounded with cautious circumlocutions.
- Tripartite participation, that is, coordination beyond the level of consultation, is not taken up by leaders of political parties once they become premier. Union federations hardly seem resolved to go beyond a consultative role in this area.

Following this review of major labour legislation and this overview of recourse to legislation proposed by the parties to labour relations and the political parties, we shall make a critical analysis of present labour legislation and its many implications. In other words, we shall attempt to define more clearly the discrepancy that may exist between union and management demands and proposals or offers by the political parties on the one hand, and labour legislation actually adopted and its real scope on the other.

The Legislator's Response: Assessment and Implications

The overall assessment of present labour legislation requires that we analyze both the content of these rules and their effect. While following this two-pronged approach, we cannot overlook the socio-economic setting causing or giving rise to the legislation, and also the influence of the legislation on the setting. To this end, we shall proceed in three complementary stages. First, we will point out certain features of the process of legislative intervention in this field. Second, we will highlight the scope of the major rules of labour law. Third, we will conclude with a brief analysis of certain implications of the rules, implications that may at first glance be unsuspected.

The Development of Labour Law

Labour law, in its modern conception and according to the general teaching of doctrine, is said to be the result of industrialization — a sort of by-product. The development of new rules was not made necessary simply to alleviate the effects of the worker's legal subordination, but was particularly necessary because of the marked economic inequality of the co-contractors in this new context. Mass production, the taming of new sources of energy, concentration of the required financial and technical resources, and the division and fragmentation of individual jobs had the effect of increasing the economic and occupational dependence of employees. Thus, employees found their numbers greatly increased in a single workplace; they arrived empty-handed, and all were easily replaceable or interchangeable. In the context of the industrial revolution, the regulatory dynamic of the law of supply and demand could not have its normal play, and so new legal rules were called for. The process was not new. In the aftermath of the Black Death, at a time when the law of supply and demand might have worked to the advantage of workers, given the reduction in their numbers, a rise in workers' wages was in fact prevented by state prohibition.[81]

The issue of interest to us here is primarily the nature and importance of these legislative interventions. As we have previously seen, in the first part of the study, the earliest labour laws consisted mainly of providing "first aid" to employees, to ensure minimum guarantees for their material subsistence and their survival in the employer's enterprise. Repeated analysis has by now demonstrated that the socio-economic context was indeed unfavourable to employees, and that the law in general served them just as poorly. Civil law was principally patrimonial, guaranteeing the legal security of property owners. As for contractual freedom, the law could have no practical value except for someone who could refuse to enter into a contract, which was certainly not the case for employees. Also, the latter, who were to be found in factories, could hardly benefit

from the broad freedom of trade guaranteed under the *Criminal Code*. In sum, economic and occupational inequality was so strong that the formal legal inequality of citizens concealed inequity, injustice and domination. Corrective measures and regulatory mechanisms were required.

This hostile legal framework also enables one to understand why assistance, support and corrective action could only with difficulty come from the courts. At most, the approach of the courts allowed it to be demonstrated that, in practice, the law was unsuited to the new social and economic conditions. Further, it may be seen that this characteristic of labour laws results from the relationship between the legislature and the judiciary. Since the task of the courts is not to make the law, but simply to state it, it should be no surprise that judges have been unable to adapt the law to social and economic circumstances. New rules were required, and this is a political task. We have already been able to note that the contribution of new rules occurred piecemeal, and only for the most urgent issues. The interpretation and application of new labour laws were made by the courts, circumspectly and conservatively. Generally speaking, the courts became the guardians of the legal system of the period: they argued that the new rules should be treated as exceptional measures, and thereby authorized a restrictive interpretation. Since then, there has been a continuing dialectic between the legislature and the judiciary concerning labour, with many of the amendments to labour legislation being only positive or negative responses to judicial decisions.[82]

This process is not particular to Quebec or even to Canada: the history of labour legislation in Britain, West Germany, France and the United States reflects the same pattern, although the solutions adopted may be different.[83] Whatever the case, the judicial counterweight to the legislator's action and reaction cannot be overlooked in appreciating the design and structure of labour legislation. This is a key component, in that the courts have generally served as a "handbrake" on the development of labour law, and their action has gone far beyond mere concern for the consistency of the law as a whole. Even court decisions that were rather favourable to an individual employee were not really exceptions to the general approach, which has been fairly hostile to collective action. By way of illustration, in the following excerpt from *Harrison v. Carswell*, the Supreme Court of Canada ultimately had to decide between the right to property and the right to picket:

> The submission that this Court should weigh and determine the respective values to society of the right to property and the right to picket raises important and difficult political and socio-economic issues, the resolution of which must, by their very nature, be arbitrary and embody personal economic and social beliefs. It raises also fundamental questions as to the role of this Court under the Canadian constitution. The duty of the Court, as I envisage it, is to proceed in the discharge of its adjudicative function in a reasoned way from principled decision and established concepts. I do not

for a moment doubt the power of the Court to act creatively — it has done so on countless occasions; but manifestly one must ask — what are the limits of the judicial function?[84]

Another feature of this legislation results from the piecemeal approach, without any comprehensive plan or specific policy direction, at least in appearance. This situation is explained mainly by the fact that the intention was not to carry out a radical reform of the legal system. It was believed to be sufficient to make simple adjustments and special adaptations required either by changes in the economic situation or as a response to social or political considerations. It is not surprising then that labour laws are constantly being amended (twenty times in as many years, in the case of the *Labour Code*) or are often the subject of stormy debate in the National Assembly and in the news media; they are seen, at the time they are tabled, as temporary measures, likely to be amended in subsequent sessions of the Assembly.

These legislative acts often have important political implications, since they specify, limit or circumscribe the state's role in society, the right to property, the employer's prerogatives, and the rights and freedoms of employees and their unions. In other words, labour laws directly concern opposing interests; the proponents on either side have sufficiently well-articulated means of exerting pressure, which appear as soon as a bill is tabled. This may explain the difficulty of intervening rationally. However, the structure of these laws bears eloquent testimony to a painful gestation. The general context represents an economic and political backdrop on which are drawn the demands and proposals for legislative intervention described in the previous section.

When labour bills have undergone the prior test of real consultation, not only study in the National Assembly but application as well has been facilitated. For example, the abolition in 1969 of the Labour Relations Commission in favour of a new and original mechanism consisting of investigators, investigation commissioners and the Labour Court occurred in a straightforward manner. The parties represented on the Advisory Council on Labour and Manpower felt the bill to be of their own doing, which encouraged them to adopt a more positive approach at the time of study of the bill in the National Assembly and its implementation. The 1977 amendments to the *Labour Code* (system of arbitration of grievances tightened up, anti-strikebreaking measures, compulsory arbitration at end of first contract, etc.) were the subject of a long process of real consultation between the parties. The labour bill (S.Q. 1977, c. 41) did not give rise to endless debate in the National Assembly, and was adopted easily, even though not everyone willingly accepted all the new rules. It would seem that the more positive attitude of the parties on the labour relations scene also calmed the official opposition. True consultation not only made the legislative process easier, but eased implementation of the new rules, which already had their roots in the workplace.

Demands, offers, proposals and counterproposals for legislation made by the parties to labour relations, political movements and the government are often based on legislation by neighbouring governments. Labour laws in the other provinces of Canada and the United States serve both to justify a demand for intervention and to demonstrate that we should be able to benefit from experience elsewhere, successful or otherwise. Many commonplaces come to mind illustrating the influence of other legislative assemblies:[85] "It stands to reason we should have this law — Ontario, British Columbia and the federal government already have it . . ."; "Our province is the furthest ahead in this field"; or "We've gone too far in this field — that's why there are so many strikes [or why there is so much unemployment]," etc.

The positive or negative influence of neighbouring legislation is felt in every respect. The most recent federal government bill to amend the *Labour Code* (Bill C-43) could also be regarded as a catching-up operation, because most of its provisions appear already in labour legislation in Quebec, British Columbia and Ontario. In labour, as in life, everything is relative.

As a few final observations on the legislative process in labour matters, we note the new use of a technique known as the "framework law." The two most important laws of the past ten years, the *Act Respecting Labour Standards* and the *Act Respecting Occupational Health and Safety*, offer no better example of true framework laws. The term applies to acts that include objectives, broad parameters, and minimum threshold levels. For the rest, the acts confer broad regulatory powers on the government to complement, specify, make fine distinctions in or suspend the principal provisions of the act in question, or provide for its total or partial application.[86] To illustrate, s. 223 of the *Act Respecting Occupational Health and Safety* includes 42 subsections parsimoniously conferring normative power on the occupational health and safety commission; the *Act Respecting Labour Standards* attributes similar power to the Labour Standards Commission and the government in ss. 29 and 88 to 92. This two-stage process achieves great elasticity and retractability in these laws; they could remain formally unchanged even when their real scope had been noticeably altered simply by regulation. Depending on the will of the government in place, it may suffice either to abolish certain regulations or amend them to subject a given activity sector to or exempt it from application of one or another part of the act, without waiting for another session of the Assembly or causing a major debate to be held beforehand. This could mean that a framework law is in fact also a "chameleon law," able to change colour and blend into the political background of the time.

New Content of Labour Legislation

If we now consider the content of labour legislation enacted in the past

44 years, important changes may be noted. First, the state intervened from 1940 to 1960 principally to facilitate establishment of collective labour relations. Unions were thereby given the legal means to establish themselves as a party to labour relations (certification, union monopoly, compulsory negotiation, legal effects guaranteed in the collective agreement, etc.). Employees were enabled to negotiate their working conditions collectively, where they could not do so on an individual basis. The history of U.S. law (the *Wagner Act*) and the law in other provinces is instructive as to the real economic considerations that prevailed in making these many choices:

> "Full freedom of association" and "representatives of their own choosing", under the protection of the Wagner Act, were essential for the free and democratic collective bargaining which Congress believed would *promote a healthy economy*.[87]

The primary characteristic of this system consisted of giving workers a legal, peaceful and orderly channel through which they could present their collective claims to their employer. Strikes described as being for "union recognition," whether real or virtual (i.e., the threat of strike), were no longer necessary to force collective bargaining on working conditions. This was the rule of law applied to labour relations, a way of "taming" the process. On the political level, the beginnings of democratization of the workplace were imposed simultaneously on two levels: first, only the union freely constituted by and for the employees was eligible for certification, provided it obtained the support of a majority of the employees involved; second, through their collective body, employees could participate in developing their conditions of employment.

This democratization had definite limits. The objective can be achieved only to the extent that employees really participate in the government of their union, and such democratization cannot exceed the framework of either the bargaining unit, i.e., the enterprise, or issues related to conditions of employment. To achieve democratization in the face of objections or hesitation on the part of employers, the narrow framework of the enterprise had to be selected.

Limitation of the collective bargaining system to the framework of the single enterprise implicitly encompasses another characteristic: the proportional stopping of state intervention. The more the collective bargaining system can be made positive, accessible and widespread, the less the state is called upon directly to impose working conditions by law. This second feature is observed more often when the organization of collective labour relations is limited to the enterprise, where one of the parties is the "owner," or master of the house. As soon as the bargaining framework extends beyond the enterprise, state intervention increases.[88] The more the group covered by a collective agreement is broadened to include several enterprises or an activity sector, the less it is possible, generally speaking, to apply direct democratic rule. Through

a combination of legal, economic and sociological factors, there is apparently a definite relationship between the framework of the collective bargaining system and the degree of employee participation in the mechanisms of developing their working conditions on the one hand, and the greater or lesser intervention of the state on the other. To the extent that the population base of employees is broadened, the role of the collective body and its elected or appointed agents also appears greater. The Quebec experience of sector-based negotiation (in education, health services and construction) provides information in this field. The process is accentuated when the unions face a single employer, the state.[89]

The initial choice of collective bargaining framework (the enterprise) and of other broad rules of the system (a single union party, obligation to negotiate but not to conclude an agreement, prohibition of strikes or lockouts for the duration of a collective agreement, etc.) fully respects the overall legal and economic framework of our society:

- Employers remain free to choose their position, means of production, and organization.
- Ownership of the enterprise and results of its activities remain strictly the employer's concern.
- Labour relations, manpower costs and the selection of employees remain the concern of the contractor and are all factors that stimulate competition.
- The employer's prerogatives of freedom of management are not directly called into question; however, the employer may make concessions, and must submit certain of his personnel management decisions for scrutiny by arbitrators or labour commissioners.

Thus ownership, accession, free enterprise and the law of supply and demand are still solid foundations for the organization of economic activity and were in no way questioned by the labour laws governing collective bargaining. In this sense, adoption of the *Wagner Act* in the United States, the *Labour Relations Act* in Quebec, and other laws in Canada in no way caused a revolution in the legal system, and even after 44 years of experience have not been a driving force for radical reform of labour relations within the enterprise. For the same reason, this system of collective labour relations has never altered the employee's status in the enterprise: the employee is still legally an outsider, a sort of non-citizen.[90]

We should also note the definite limits of the collective labour relations system, which are of several orders. First, the system concerns only one type of employee (the subordinate not himself possessing several management prerogatives). So it is that foremen, superintendents and all other mandataries of the employer are excluded from the system, whatever their numbers within the individual enterprise. The second limit arises from the practical organizational constraints inherent in the system. Even though the *Labour Code* (s. 21) specifies that a single

employee may use the system, the material and professional costs are in fact the same for setting up any system, whether it serves 5, 10, 20 or 100 employees: certification process, negotiation, drawing up the collective agreement, supervising its administration, etc. Taking into consideration the slowness of the process and the speed with which enterprises metamorphose, experience shows that this system of collective labour relations is fairly well suited to large and medium-sized enterprises in the primary or secondary sector, but very little suited to the small enterprise, and even less to small and medium-sized enterprises in the tertiary sector. It is precisely in the tertiary sector that the active population is increasingly found (see Table 2-1). Although labour commissioners have handed down 16,800 decisions on certification between 1972 and 1982, it is believed that the number of employees governed by a collective agreement has remained stable in comparison to the active population.[91] While the 1944 *Labour Relations Act* achieved some of its immediate objectives, the *Labour Code* that replaced it now seems poorly suited to respond to the real problems of the present and the near future. This is because the framework of this collective labour relations system (the enterprise) also imposes restrictions on the object and scope of issues that may be dealt with. Thus it is difficult, and sometimes impossible, to develop, at enterprise level and beyond the respective wishes of the parties concerned, conventional measures for settling issues such as:

- vocational training to meet present and future needs;
- job security;
- mobility between related enterprises and occasionally within the same enterprise, but outside the bargaining unit;
- supplemental pension plan.

Perhaps because of the intrinsic limits to this system of collective labour relations, and also because of the numerous functional difficulties in the bargaining process, the state has gradually had to intervene to resolve certain issues directly or to arrange its participation. This twofold intervention has noticeably, but not fundamentally, altered the initial system of 1935–44.

First, the state has raised the collective bargaining threshold considerably. When the parties begin collective bargaining, the point of departure is working conditions already guaranteed by law.[92] Unless there is a settlement allowing a few deviations, the *Act Respecting Labour Standards* and the *Act Respecting Occupational Health and Safety* imply, by way of example, that negotiations cannot result in provisions below the following levels:

- content of pay slips provided for (s. 46, LSA);
- definition of overtime and terms for calculating applicable rate (ss. 52 and 55, LSA);
- seven holidays (ss. 60–65, LSA);

- right to a third week of paid annual leave after ten years' service (s. 69, LSA);
- right to notice of termination of employment or layoff (ss. 82 and 83, LSA);
- scrutiny of grounds for dismissal for any employee having over five years' service (ss. 124 and 125, LSA);
- use, free of charge, of appropriate protective equipment for the employee's health and safety (ss. 351 and 78, OHSA);
- right to refuse work when the employee deems it necessary to do so under the cirumstances to ensure his physical safety or that of his co-workers (s. 14, OHSA).

Aside from this list, which is in no way exhaustive, a number of other issues have, in a way, been removed from collective bargaining and regulated by law:

- employees' financial contribution to certified association, regardless of whether they are personally members, and the employer's obligation to make deductions at source (s. 47, LC);
- official language of the collective agreement and related documents (*Charter of the French Language*, s. 41 ff.);
- uninterrupted continuation of the collective agreement, even if substantial changes are made in the enterprise by the employer (s. 45, LC);
- The *Act Respecting Occupational Health and Safety* provides a forum separate from that of collective labour relations for dealing with certain issues to be resolved in case of dispute by public agencies other than arbitrators. This is true for the choice of physician, the prevention program, individual safety measures, etc. For all of these, the Commission de la santé et de la sécurité (equivalent to the former Workmen's Compensation Commission) supervises, organizes and if necessary rules in the place and instead of the parties. Although the *Act Respecting Occupational Health and Safety* provides that a collective agreement may grant more advantageous measures, administration of the portion of the benefits resulting from the Act itself remains the concern of the agencies set up under the Act.

In addition to these direct state interventions in the actual object of collective bargaining, the state no longer leaves the parties alone; it takes part in the process or provides avenues allowing it to enter on the scene to:

- dispatch a conciliator at any time (s. 55, LC);
- impose arbitration and put an end to a first collective agreement if necessary (s-ss. 93.1 and 94, LC);
- exercise the right to strike or lockout (s-ss. 58.1 and 109.4, LC);
- impose a return to work of employees following a strike or lockout (ss. 110 and 110.1, LC);

- scrutinize the grounds for dismissal decisions (ss. 14 and 100.12, LC);
- appoint grievance arbitrators (in 27 percent of cases).

In addition to serving as a "legal threshold," a base on which the collective agreement is erected, these rules have the overall effect of taking collective bargaining out of the private domain. Now, parties to collective labour relations are no longer really left to themselves in establishing a bargaining agenda. Supplantive or provisional rules found notably in the *Labour Code* (ss. 100, 100.2, 100.12 and 101.5), the *Act Respecting Labour Standards* (ss. 49, 53, 60, 66, 79 and 94), and many other labour laws impose a degree of state intervention on negotiators, which may be manifested in any number of ways:

- The presence of supplantive rules leaves the parties with an unavoidable alternative: either they accept the legal standard, or they find substitute conventional rules. There is no third option.
- As provisional rules already apply, one or both of the parties are motivated to deal with these issues in the collective agreement, refining or adapting them to their needs, and it becomes that much harder for the other party to refuse to fall in line.
- Working conditions guaranteed by law (labour standards, occupational health and safety, etc.) with no prior compromise are regarded as simple minimums, self-evident in justifying further demands. It is true that in matters of occupational health and safety, the employer will often take the opposite course, maintaining that these are issues that have been removed from the field of negotiation.[93]

Through these various legislative techniques (minimum rule, supplantive rule, applicatory regulation, etc.), the state is able to guide or direct the parties onto predetermined paths.[94] Thus the very character of the collective agreement is altered. How could we still regard this collective document as a simple agreement or a contract of a private nature? The collective agreement may indeed become, in the legal framework, a normative document:

- negotiated by a party representing a group of employees, by virtue of its legal authorization, i.e., certification;
- that is the product of collective bargaining between two parties neither of whom has had to choose the other party;
- with its contents partly preselected by the state;
- that applies regardless of the departure of either of the co-signatories (ss. 45 and 61, LC), provided the enterprise survives and there are still employees in it;
- selected in part in the place and instead of legal rules otherwise applicable.

These facets of the collective agreement will serve to reveal its hybrid

character and its integration into the overall legal order of labour. The traditional dichotomy between law and contract would thus seem no longer to have its place in this matter of law. The overall labour system, that is, conditions of employment and working life, would be public; the few distinctions to be made with regard to certain working conditions would tend to be secondary or complementary.

The marked intervention of the state goes beyond mere content of the collective agreement: its presence in the form of numerous agents is increasingly constant throughout the process of collective labour relations. We are already far from the initial U.S. approach, which was intended to be limited to leading the parties to the bargaining table. Although the table is already nicely set and laden with bargaining food when they are brought to it, a state representative might also sit down to dinner at any time. The minister of labour, for preventive purposes or to assist the parties in conflict or liable to be, may dispatch a conciliator to the negotiations, without being formally requested to do so (ss. 54, 55, LC; LMDA, s. 3, S.Q. 77, c. 41). In the case of first negotiations for a given bargaining unit, the state may also take away the parties' right to negotiate and impose arbitration of working conditions (s. 93.1 ff., LC). The firm may not continue its normal activity during a strike or lockout: employees affected may not be temporarily replaced (s-s. 109.1 ff., LC), and a supervisor may monitor observance of the prohibition and report on it (s-s. 109.4, LC). At the end of a strike or lock-out, the state also ensures that employees return on a priority basis (ss. 110 and 110.1, LC). There are many other indicators that bring out the public character of collective labour relations:

- public notice to be given to the parties at various stages of negotiations: notice of negotiation (s-s. 52.1, LC); notice of strike authorization (s-s. 20.2, LC); notice of occurrence of strike or lockout (s-s. 58.1, LC);
- public tabling of collective agreement and schedules (s. 60, LC) and of arbitration awards (ss. 89 and 101.6, LC).

These rules illustrate that collective bargaining takes place on a highly visible plateau, where the parties are never entirely alone and must take into account the real or virtual presence of a third party. We have emphasized on a number of other occasions the many implications of these changes. Another observation is immediate: the system of collective labour relations cannot be explained as a simple substitution for or transposition to the collective level of individual negotiation of working conditions which can no longer take place.

We shall now consider the content of the *Act Respecting Labour Standards* and the *Act Respecting Occupational Health and Safety*. We have already pointed out some of the provisions of the *Act Respecting Labour Standards* representing general working conditions for all

employees, and at the same time serving as a point of departure for individual or collective bargaining. The act also includes a characteristic feature, highly revealing of the new direction of labour legislation: a more direct, more general and more complete elaboration, through state channels, of conditions of employment. Until 1979, the state intervened in two ways in this area: by guaranteeing certain minimum working conditions (wage rates, weekly day of rest, annual leave), and by facilitating the development of working conditions by the parties (the object of the *Labour Code*). Despite 44 years of experience, 60 to 70 percent of employees have not used or have not been able to use this collective "do-it-yourself" channel. However, collective agreements resulting from this process also exercise a positive influence on the 60 to 70 percent of employees not covered by an agreement. Generally speaking, firms not party to a collective agreement refer to agreements in their own sector when establishing their conditions of employment.[95] Whatever the case, the 1979 act allows agreements to go beyond simple minimum standards. It is perhaps for this reason that the *Act Respecting Labour Standards* was initially presented as likely to become a "contract for the non-contracted." If we look at its content in comparison to the *Minimum Wage Act*, numerous components will be noted that have altered the state labour relations system in this way:

- The worker is no longer just the employee in the strict civilist sense of the term (i.e., legal subordinate) or in the narrow sense of the *Labour Code*: managers, domestics and freelance employees are included, with some exceptions (s. 1, subs. 6 and 10).
- Applicable rates for overtime are established according to the real rate for the normal working week of the individual worker (s. 55).
- Scheduling of working periods on a basis other than the week may be authorized by the state (s. 53).
- Six non-working, paid statutory holidays are guaranteed for all employees (s. 60).
- Three weeks' paid annual leave is guaranteed for employees with more than ten years' continuous service (s. 69).
- Social and family leave (death, marriage, birth, adoption) is guaranteed for all employees (ss. 80 and 81).
- Advance notice of termination of labour contract or equivalent must be given to all employees (ss. 82 and 83).
- Certificate of termination of employment must be issued by employer (s. 84).
- Scrutiny of grounds of any dismissal of an employee with more than five years' continuous service is also ensured (s. 124).
- There must be compensation to employee for lost wages as a result of employer's bankruptcy (s. 136, not yet in force); special guarantees

that may be provided to employees under the *Bankruptcy Act* (Bill C-12, federal) certainly appear to be more legitimate and more easily achievable than the guarantee under s. 136.

Taking into account the vast regulatory power the law confers on the government and the labour standards commission, it would be possible to adapt these conditions of employment, imposed through state channels, to follow closely the general development of collective agreements. In this sense, these labour standards would be the shadow of collective agreements. The situation clearly illustrates that we have passed the minimum intervention level and that it would be possible, in many of the soft sectors, to substitute the state system for the collective bargaining process. Need we restate that the more complete and detailed the public system is, and the more it is gradually adopted through regulation, the less employees will feel the need to take the path of direct negotiation through their unions? True, this system was seen as a necessity, since the majority of small and medium-sized enterprises have not been able to be put under a collective bargaining system.[96] It is also possible that the *Act Respecting Labour Standards* may serve in the coming years, and to the extent that its potential can be used, to sidestep the demand for a multipartite collective bargaining system that some were asking for as a complement to collective bargaining at the enterprise level, notably in cases where there was a high turnover of manpower. This dilemma of state vs. union being acknowledged, it will have to be resolved sooner or later. The response chosen will noticeably alter the general labour system in Quebec.

The *Act Respecting Occupational Health and Safety* of 1979 also contains special features that have altered the labour scene. Two major thrusts characterize the new legislation: a partial departure from the traditional pattern of preventive action being the business of the person in charge of the enterprise, and a marked distinction between prevention and collective bargaining. We will come back to these two points so as to identify clearly the new aspects of this legislation, the medium- and long-term implications of which may be highly significant.

The broad principles of civil liability (criminal and contractual) have always applied in the workplace, as in any other field. The employer — master of the establishment, property owner, free to choose the channels and means of production, and to choose his employees — had to answer for damages resulting from his acts and his property (s. 1053 ff., *Civil Code*). The *Workmen's Compensation Act* of 1931 and its many amendments have not basically altered this initial pattern; only the form of compensation was changed so as to guarantee collectively that the victim was in fact promptly and suitably compensated. It fell to the individual employer to take proper measures to prevent occupational accidents, by eliminating any factors that could pose a hazard to his

employees' physical well-being.[97] Everything was based on civilist logic to the effect that the employer, as a good manager of his property, had every interest in reducing the risk of accident. Without questioning this postulate directly, the general economy of the *Act Respecting Occupational Health and Safety* starts from another principle, one also found in the *Charter of Rights and Freedoms* (ss. 1 and 46), and stated in these terms: "The object of this act is the elimination, at the source, of dangers to the health, safety and physical well-being of workers" (s. 2, OHSA).

If this is the object of the Act, then the intent was more to rely exclusively on the freely exercised vigilance of the employer, stimulated by his own proprietary interest. Section 51 articulates, in fifteen points, the principal facets of preventive action that henceforth fell to the employer. In a way, the prevention aspect, taken in its positive dimension, is dealt with separately from the civil and penal liability aspect. The latter legal aspects are not directly altered or modified by the putting in place of this positive, participatory prevention system.[98] The second characteristic feature of the health and safety act appears as well in s. 2: "This act provides mechanisms for the participation of workers, workers' associations, employers and employers' associations in the realization of its object."

This provision means first of all that prevention should become the concern of all those involved in the workplace, and not just the employer, and also that prevention activity is to be carried on separately from collective labour relations. To this end, new institutions and agencies were put in place (health and safety committees, prevention representatives, sector-based health and safety parity associations, health and safety commissions, etc.) to detach prevention from negotiation, although the parallel structure is incomplete (s. 4, subs. 2). Thus, means were sought to avoid having prevention programs, means and institutions themselves subject to the risk of repeated negotiation of working conditions every two or three years. Consequently, the unions, like the employers' associations, are in no way kept out of prevention, and their participation is assured, as indicated in s. 2, subs. 2 (see especially ss. 16, 69, 72, 82, 88, 98, 104, 105, 141, 209 and 232, *Act Respecting Occupational Health and Safety*).

In practice, it is not always easy to maintain the distinctions between prevention and negotiation: in both, compromises are unavoidable, and the principal actors may be the same. In the medium term, it is possible that the distinction may be accepted and that the parties will be able to maintain it, so much do the two issues require different treatment. For the time being, this new legislative act has noticeably altered a number of facets of the traditional system:

- separation of prevention from civil liability: prevention is no longer, in law or in practice, a mere secondary concern;

- recognition of the worker's right to work directly on accident prevention and conferral of the means for him to do so;
- distinguishing the prevention issue from the issue of negotiating working conditions: this means that prevention is not subject to the risks of any overall compromise;
- achievement of a prevention policy conferred on separate bodies under the supervision, and if necessary the arbitration, of government agencies (health and safety commission, inspectors, social affairs commission, labour court, etc.).

This second major law has also helped to publicize the workplace. While the observation seems self-evident, the long-term implications of the process are more uncertain and debatable.

To conclude this brief content analysis of major labour legislation, we wish to emphasize the method selected to find the target population. Since the subject of labour laws is the "employee," the term should be defined. Faced with this problem, the first labour legislation was limited to indicating who the employee was, by means of a series of juxtaposed occupational titles:

> "employee" means any apprentice, unskilled labourer or workman, skilled workman, journeyman, artisan, clerk or employee, working individually or in a crew or in partnership.[99]

Subsequently, in 1964, a very broad formula was used as a definition: "a person who works for an employer and for remuneration." In spite of appearances of a flexible approach, the courts have always retained civilist concepts of legal subordination and the right to order in making this qualification. In 1979, the *Act Respecting Occupational Health and Safety* used a definition that was original to say the least: on the one hand, going back to the civilist concept of the contract for the hiring of personal services and, on the other hand, specifying that the relationship might be on a free-of-charge basis, which is certainly paradoxical.

One need only peruse the compilations of case law over the past 44 years to observe the difficulties encountered by the courts in defining the term *employee*, especially since the changes brought about by legislation hardly helped to clarify the issue. This is a matter of capital importance, however, since the definition, depending on whether it is broad and flexible, or narrow and restrictive, immediately affects the active population governed or protected by the rules of labour law. We have witnessed many debates on secondary points of labour law, but when it comes to the fundamental definition, we seem to have been left to the fits and starts of case law.[100] Of course it is difficult to define in a static manner the characteristic components of the employee, inasmuch as the subject is constantly changing, in terms of both the type of relation established between the parties to a labour contract and the means by which the

labour is performed.[101] While it is nearly impossible to define an employee for purposes of future application of labour legislation without causing the law to become ossified, it might be necessary to resort to techniques that would enable civil law to be abandoned and also leave the application of proper parameters for identifying employees to specialized bodies.[102] In sum, the real scope of labour laws is directly dependent on its subjects, that is to say, on the definition of the employee in question.

Long-term Implications of Present Rules

The rules that are added almost annually to the body of labour law may sometimes produce side effects that were not necessarily being sought, or were not even known, at the time they were passed.[103] These exponential effects are very real and sometimes give rise to new directions and surprising results in the whole of labour law. Thus, it would appear impossible to deal with the scope of present labour legislation without considering this dimension or emphasizing certain directions taken by these rules, and not delve into futurology. In light of this, we will stress certain fairly new features of the role or functions attributed to the certified union, the difficulty of situating the true position of the state because of its manifold functions, and, finally, changes in the dynamic of collective labour relations brought about by the change in status of the certified union and the ongoing presence of the state on the scene.

Change in the Union's Role

The certified union has increasingly become a public body for managing employees. For those who still believe in stopping the flow of events by falling back on familiar terms and folklore, this assertion may be surprising, even shocking. However, one need only analyze the present situation (in practice and in law) to see that such is the direction of the current on which the certified union is riding.[104] Let us briefly review the legal framework of the certified union.

The certified union is subject to numerous provisions that tend to facilitate union activity, while ensuring a minimum of freedom for individual employees. To achieve this twofold objective, new standards were adopted — often, we would stress, at the request of union federations and management as well.

- Every employer who is a member of the certified association must pay union dues or the equivalent amount, and the employer must make a deduction for dues at source, on the employee's behalf (s. 47, LC).
- The certified association may not require the employer to dismiss an employee because of the employee's having been expelled from the

association or because the association has refused the employee's admission as a member. Under s. 17 of the *Charter of Rights and Freedoms*, the union must treat all employees equally (s. 63, LC).

- The certified association must seek the approval of its members (by secret ballot) for purposes of electing its leaders, taking a strike vote, or concluding a collective agreement (s-ss. 20.1, 20.2, and 20.3, LC).
- The certified association must disclose its financial statement to its members every year (s-s. 47.1, LC).
- The certified association must deal with all members of the bargaining unit in a fair and equitable manner; the labour court may investigate the union's behaviour following a dismissal, disciplinary sanction or non-recall to work by the employer, regardless of any general or particular agreements between the employer and the union (s-ss. 47.2, 47.3, 47.6 and 110.1, LC).

Such controls on the internal management of the union were made possible, we feel, by the fact that neither society nor the state still regarded the certified union as merely a private association. The Supreme Court of Canada also noted this fact more than twenty years earlier:

> . . . those who exercise a control over union membership hold, towards the working classes, a position which the law effectively raises above the level of merely private nature.
>
> Under like conditions, the right claimed by respondent and the duty required to be performed by appellant cannot be of a merely private nature.[105]

The problem in this area consists of finding the proper measure of state intervention. To what point should the state mix into the union's internal affairs to protect the individual, without at the same time subverting the union or turning it into a public body of private origin? This difficult yet essential balancing act, while it does not actually turn union leaders into public agents for managing employees, was described in these terms by Professor Otto Kahn-Freund:

> Trade unions exercise public functions, but they cannot exercise them unless they remain free and autonomous. In a democratic society they are not part of government. They represent the interest of the workers and in so doing they exercise a public function. . . .[106]

What is the situation in Quebec? The presence of these new rules may slowly, almost imperceptibly, affect relations between union and employees, and take us away from the traditional concept in which the union was seen as the body representing and defending workers' interests, motivated by the concrete, deliberate solidarity of its members. Of course, union funding is facilitated by the effects of s. 45 of the *Labour Code*, but users of the union's services can always be more demanding

individually. Since employees are constrained to contribute to the union's financing, membership quickly becomes automatic, consciously or unconsciously, regardless of personal convictions. It is an easy step from there to the employee's seeing the union as a service agency and regarding it as his creditor, whom he is thus less ready to serve. We are thus slipping back into individualism, which can only reduce the vitality and strength of the union.[107] Taking into account the potential for external control of the union's decision making, it is possible that the state may also exert an influence. In other words, case law of the Labour Court in this area (s-s. 47.2, *Labour Code*) would be considered as one of the components in the union's decision making. The decisions made can thus differ greatly and diverge from the collective interests of the group. It is in this sense that the accredited union may sometimes forget its main raison d'être, defending collective interests, and instead serve the more immediate and more personal interests of the employees directly involved. This situation may in fact result, partly at any rate, from the new rules.

This trend follows along the same lines the courts and the legislators seem to be following. To assess the behaviour of unions in a labour conflict, the courts often base themselves on the assumption that leaders can and should have absolute control over the union troops, and all that is needed is an order to retreat from the commanding officer (the union president) for this to happen. In this way, the courts have demanded through injunction, to assess the extent of the union's civil liability, that union leaders give a clear return-to-work order and have considered the way in which the order has been obeyed.[108] This is the management role that seems to be increasingly attributed to the union. As soon as it is deemed that the union has strayed from that role, the courts have been ready to hold the union responsible for the results. The courts have not been alone in regarding the certified union in this way. The legislator has taken a similar approach, in a more or less clear manner.

A number of special legislative acts have required that a return-to-work order be obeyed by at least 70 percent of the employees involved; otherwise, the union would automatically be in violation of the act:

- *An Act to Ensure for Users the Resumption of the Normal Services of the Montreal Transportation Commission*, S.Q. 1967, c. 1;
- *An Act to Ensure the Protection of Police and Fire Services to the Citizens of Montreal*, S.Q. 1969, c. 23;
- *An Act to Ensure the Right to Education to the Pupils of the Commission scolaire régionale de Chambly*, S.Q. 69, c. 68.

The law sometimes uses the technique of presumption, rendering the union immediately liable for a circumscribed situation of fact, a liability from which it has the burden of removing itself subsequently, under predetermined conditions:

> Every association of employees and every union, federation, confederation, congress or council to which such association belongs or is affiliated or of which it is a member is deemed to have contravened section 5 on any given day upon proof, subject to section 17, that employees represented by such association of employees have not complied with section 2 or section 3.
>
> The presumption may be rebutted by the association of employees or the union, federation, confederation, congress or council only if it proves that it took appropriate measures to induce the employees represented by the association of employees to comply with section 2 or section 3, as the case may be.[109]

While the unions have insisted strongly and for many years that the state intervene through legislation, it seems clear they were also affected by the labour laws thus passed, and not necessarily as they might have expected at the outset.

Confusion of Government Functions

Since the time the state became an employer in the sense of and for purposes of the *Labour Code* in 1965, thereby entering into the melée of collective labour relations, its legislative interventions have occasionally given rise to certain ambiguities. While not maintaining that the government is in a conflict-of-interest situation (to the extent this is even legally possible), it might be believed or inferred that the government, which also acts as an employer, cannot overlook this dimension when organizing or reorganizing labour legislation. To the extent that the state-employer status is not clearly defined and is insufficiently distinguished from the status of other employers, the doubt may persist. Thus it is important that the system of collective labour relations in public sectors be clearly decreed and applied in a consistent whole, and not reworked or revised before or during a phase of intense bargaining. When the parliamentary wing of the state participates, even indirectly, in negotiations by the state-employer, the quality of the output is affected and the authority of the law diminished.[110] Such a situation may accordingly reduce the scope of other labour legislation from the same source.

It can never be emphasized enough, in our view, that bargaining in the public sector is a basically political act and will always be so as long as real bargaining continues to exist, because of the ongoing combination of factors: employer (i.e., the state, the actual government or its agents); object (i.e., public services on the one hand and a considerable portion of the budget on the other); individuals targeted directly (i.e., government employees or equivalent) and, indirectly, the recipients of public services, who are also taxpayers. If we add to this the fact of the state's presence and influence in labour relations of other enterprises, what emerges is that this field is an immense network in which the components (private, semi-public and public) are closely interrelated.

The overall approach taken by the state as employer in its own collective labour relations may affect the scope of the state's many interventions in the collective labour relations of other employers in the public and private sectors. This situation may be particularly delicate in firms where the capital or funding may come, in whole or in part, from public funds or which are under public trusteeship (Quebec Deposit and Investment Fund, Société générale de financement). In this field, there is no longer any useful abstract predication: the only effective means of persuasion is example and the search for chain effects using a concrete model. For these reasons, the authority of labour laws with other employers, unions and employees may be altered (granted, in the long term) by the behaviour of the government toward its own laws. On the political level, the division of parties between public sector and private sector is by no means "watertight" — quite the contrary. The legislative act should at all times keep its place and not descend to the level of a specifc tactic to serve the state-employer's immediate purposes. In the long term, the very authority of the law is at issue.

End of a Partnership

One of the characteristics of the model initially used in 1935 consisted, as we have seen, in circumscribing collective labour relations to a single employer and the certified association representing his employees. Provided there is an agreement between them, the parties could do anything, or almost anything (s. 62, *Labour Code*): choose the bargaining method, the pace of bargaining, and content. Both parties were assured of the legal value of their main agreement (ss. 67 and 101, *Labour Code*), and also of any special or additional agreement. This is no longer quite the case, since certain of these agreements may be reviewed and amended by public agents: screening measures to monitor inflation were temporarily imposed in 1976 under the *Anti-Inflation Act*. Aside from this passing interference, certain agreements between an employer and a union may be reviewed, monitored, and in some cases set aside. This is particularly so where the union may have made an express or a tacit agreement following a dismissal, disciplinary sanction or non-recall to work (s-ss. 47.3 and 110.1, *Labour Code*). As the union's position may be assessed by the Labour Court and the employer's initial decision made subject to scrutiny by an arbitrator (s-s. 47.7, *Labour Code*), such agreements between the parties are neither definitive nor final: they are, in fact, under resolutive reserve. This affects the union's authority in the employer's eyes, and both parties know that any possible agreement between them will be definitive only after the prescription of the law to exercise its recourse (s-s. 47.3, *Labour Code*). It is also possible for the union to play one side against the other, by making an agreement with the employer in an attempt to gain certain benefits from it, while hoping

that the employee will complain.[111] These effects may have been underestimated at the time the control was put in place (s-s. 47.3 ff., *Labour Code*), but they can affect the quality of relations between the parties, who are responsible for collective labour relations within the enterprise. This process also illustrates the difficulty of striking a balance between measures aimed at organization of collective labour relations and measures dealing mainly with protection of individual rights.

Another illustration of the problem of measuring rights could result in the near future from application of new provisions of the *Charter of Rights and Freedoms*. Equal opportunity (affirmative action) programs in employment[112] could overturn job security provisions contained in many collective agreements. In order to correct and catch up, such programs allow for suspension of the application of a number of terms of the collective agreement. Without seeking to determine the quality of these standards, it seems obvious that the Charter has favoured an egalitarian approach to the freedom to make an agreement. Application of equal opportunity measures will certainly shake up the present system of collective labour relations. It will be difficult, at the very least, to assess the general implications for all employees governed by collective agreements. The situation reveals clearly the mutual influence of labour laws and the repercussions they produce. As concerns the Charter, the parties' freedom to make contracts should be limited in order to ensure greater equality. This price will not, however, be paid by the same individuals.

Finally, we should emphasize two other long-term effects of labour laws that do not seem to have been directed toward labour relations, at least not originally. These concern laws allowing collective recourse and the exercise of recourse to small claims.[113] It will be acknowledged that these are two legislative measures sharing the same objective, to which unions originally subscribed, namely easier and more effective access to justice. These forms of recourse have been used for a number of years by employees and users of services against unions that initiated an illegal strike and thereby deprived them of their wages or a public service, as the case may be. In the case of an employer having several employee groups, the employer would only need to lay off the other employees temporarily because of the illegal strike by one group for the union in question to be required to reimburse the wages thus lost.[114] In the case of collective recourse, success in the initial stage of the process (authorization to exercise the recourse) for private users of a public service as a result of an illegal strike seems to produce immediate results.[115] Taking into account the newness of these two measures, the deep-seated legal implications of this judicial intervention cannot yet be ascertained. It seems certain, however, that the practice of collective recourse and individual petitions to the small claims division will have considerable repercussions for everyone involved (employers, employees in other

groups, striking union members, unions, federations, etc.). The new judicial means are certainly less costly, less painful, and quicker, but also more corrosive than the large suits for damages and interest experienced previously. Recent amendments to the *Code of Civil Procedure* to facilitate the exercise of collective recourse, by their very presence in acts amending the exercise of the right to strike in public services, are very revealing of its new end purpose.[116]

Conclusion

This review of the legislative output of the past 44 years, the placing of the legislation in context, and the critical analysis that followed allow us to make several general observations. The question, in short, is whether a greater knowledge of the roads taken in the past can facilitate the choice of appropriate paths in the coming decade.

In the first place, it appears that what holds true for Quebec applies as well to the rest of Canada, to the extent that the same problems arise. In labour matters, economic borders extend far beyond constitutional lines, and often ignore them. Of course, fine distinctions must be made, particularly in the area of the public sector, where Quebec has experienced special problems.[117] Aside from this area, distinctions among the industrialized provinces are mainly ones of form, approach and secondary matters.

This review of labour laws, by describing both their numbers and the diversity of the issues dealt with, has demonstrated the progression in the "publicization" of labour relations. While on the constitutional level the division of jurisdiction in labour matters is made mainly through attachment to the "property rights and civil rights" category — s. 92(13), *Constitution Act, 1867* — it must be acknowledged that labour relations are no longer private, and have become increasingly mixed. The state, through its many agencies and bodies, is a presence, and in fact an active participant, in labour relations. In the context of our legal system, it is true that legislative intervention is often the result of incessant demands by the parties involved. These laws do not merely impose a framework on individual and collective labour relations: the state now establishes thresholds, takes responsibility for certain issues, imposes its presence and may even replace the parties. It may well be that because of these factors the individual labour contract, and even the collective labour agreement, increasingly represent normative documents, the content of which is drawn as much from public as from private sources. The fact also emerges that labour law is articulated less by means of these two documents (contract and collective agreement), and that acts, regulations, decrees, directives and judicial decision take on more scope and influence. The phenomenon may be regarded, however, as an inevitable result of the state's growing intervention in economic matters as

requested or solicited, for different reasons, by unions and employers who may not have suspected that their demands would give rise to such by-products. As Professor Barbash has noted, "The more the state intervenes in market systems the greater are the difficulties which the bargaining process encounters."[118] As the state's presence seems unavoidable, we will also have to assess the effectiveness of the collective labour relations system using present data, and not an outmoded model.

Since the state now participates as an active agent in economic activity, and not just as a sort of "repair shop," it was to be expected that it would concern itself with labour relations other than as a peace officer. The legislative output of the past 15 years clearly illustrates this process. The situation raises two quite important questions to which answers will have to be found once we decide to reorganize the system of collective labour relations.

First, can even partial democratization of the workplace still be assured by collective bargaining of working conditions at enterprise level? Even though this framework has already been somewhat outmoded by the effects of legislative acts and standardized collective agreements, should we keep what is left of the present system? It may have to be complemented by other forms of participation such as (internally) supervision committees, tabling of an annual report on the firm's corporate health, profit-sharing and (externally) consultation centres, data banks, participation on planning boards, public cooperatives, and appointment of employee representatives to all boards of public institutions of an economic nature.

According to Professors J. Clark and Lord Wedderburn, the Donovan Report on labour relations reform in England inferred this threefold question:

> . . . whether new problems should be dealt with by voluntary collective bargaining or by compulsory statute law? Or, if by both, what should be the relationship between the two methods?[119]

This question seems just as relevant to our situation.

Second, how much freedom to manoeuvre should unions have so that they can carry out their original role of representative body for the socio-economic interests of their members? We have already emphasized the difficulty of balancing the safeguarding of collective rights with the protection of individual rights in such a way as to avoid turning the unions more or less overtly into public agents for managing manpower resources.[120]

Third, is the problem with respect to labour laws of a quantitative or a qualitative order? It would seem at first that this is a question rather of disorder, of an inconsistent hodge-podge resulting from the yearly addition of more bits and pieces of labour legislation. It is hard to find,

examine and establish relationships among the laws. Methodical clarification of the present rules, by gathering them together under a few general headings and simplifying their wording, would eliminate much of the tangle of legalese tripping the parties involved. Also, it is unthinkable for a major portion of legal relations in labour matters not to be organized through legislative channels. For this to be otherwise, the overall legal system would itself have to be radically altered, as it is clearly more favourable to one of the parties, i.e., the employer. It is in this sense that the law's silence is often equivalent to a licence for the employer. Labour laws, as we have seen, play a role of correcting initial imbalances; hence, the need for such laws. The contract or collective agreement alone cannot correct the situation, especially since judicial courts cannot come down on the side of the employees. We have already stressed the heteronomy of labour law — that is, its attachment to and dependence on general law — to explain the situation. For these reasons, broad corrective measures, as partial and incomplete as they may be, can and do come from only one source, in our opinion: the law. The difficulty remains of specifying the role and scope to be attributed or to be left to the collective agreement, so that the negotiation giving rise to it is real, worthwhile and democratic.[121] The collective agreement, regardless of its field of application (one or more than one enterprise), should possess the attributes of a social contract one that can certainly be perfected but is sufficiently acceptable by either side, taking into account the circumstances and shared information. We should also take account of the fact that the increased presence of the state in labour relations invites the parties to exert pressure within the major political bodies to obtain replies that are favourable to their side. In this sense, collective labour relations occupy two fronts: one political, the other professional.

In spite of the considerable changes our society has undergone in the past fifty years (better education, increased collective resources, technological development, new energy sources, etc.), the labour relation — the relationship engendered by the fact of one individual working for another — has not yet been identified by its subordinate status. How much longer will this be so? To what extent will work, the way it is performed, training, and the workers' approach to the job be altered by more widespread, more intensive and more highly perfected use of data processing, robotics, office automation, etc.

Of more immediate concern, can we continue to overlook the situation of part-time or seasonal workers in thousands of service and commercial enterprises?[122] Aside from the mechanisms provided in the *Act Respecting Labour Standards* and the *Act Respecting Occupational Health and Safety*, such employees can only with difficulty take part in negotiating their working conditions or gaining monitoring and protection agencies. Despite appearances, the same is true of the lead hand, foreman, and

middle manager, who feel just as vulnerable with respect to senior management, which is often hidden (in the case of a national or supranational company). In such cases, simple transposition of the collective relations model of 1935 can no longer suffice, or can only be an ersatz model.

If labour law is to abandon its two traditional pillars (the labour contract and the collective agreement), it should do so in order better to attach and shape itself to economic reality and to follow more closely the development of enterprise, which is the organization of economic activity. To this end, labour law and particularly labour legislation will have to take greater account of the fleeting concept of "employer." Who is the employer? Is it the management of the subsidiary, branch plant, enterprise, parent company, portfolio company, trust, cartel, multinational, etc.? In sum, the effectiveness of labour legislation depends in large part on how realistic it is, and especially on its ability to penetrate the many legal smokescreens set up by employers in response to the imperatives of economic activity such as the need for permanence and stability, building up of economic resources, management control and tax management.[123] Even in the public sector, experience shows that the reality could not be obscured for long, and that the real employer is the person in charge of the pursestrings.[124] If the law cannot for long avoid socio-economic reality without danger, the difficulty consists in learning about and acknowledging this reality.

Appendix

Legislative Output, 1940–1984: General Description Explanatory Notes:

(a) Number:
This is an identifying number for purposes of this study. The number is made up of two parts: the first two digits refer to the year of promulgation; the digit following the decimal point indicates the numerical order of the act in that year.

(b) Reference:
Gives the year of the collection of statutes in which the act is found and the chapter number, along with the date the act was assented to.

(c) Title:
Excluded from the list are acts representing only minor amendments to existing legislation, acts specific to retirement pension plans (unless there have been fundamental changes), and acts relating to professional orders and other corporations, except CRI (Conseillers en relations industrielles) corporations.

(d) Object:
Describes the major features of the act, so as to give a better understanding of its scope.

(e) Indicates that no acts were passed in that year that met the criteria for inclusion in this list; see (c).

(f) Group:
Group letters A to D serve as an initial cataloguing of the acts under four headings:

A) Manpower and the workplace;
B) Labour relations (individual and collective);
C) Government intervention in labour conflicts or to impose working conditions;
D) The state as employer (including the public and parapublic sectors).

Legislative Output, 1940–1984
General Description

Number (a)	Reference (b)	Title (c)	Object (d)
40.1	S.Q. 40, c. 37 117/5/40	*An Act Establishing the Superior Labour Council* (group C)	Creation of an organization for the study of social questions, under the minister of labour. Composed of 24 members, 8 representing labour, 8 representing capital, and 8 persons "specially conversant with social and economic problems," along with government representatives as "associate members."
40.2	S.Q. 40, c. 38 22/6/40	*Collective Agreement Act* (group B)	The origin of this act goes back to 1934, with adoption of *An Act Respecting the Extension of Collective Labour Agreements* (S.Q. 1934, c. 56), whose object was to permit extension of the application of a collective agreement to an entire economic activity sector. The *Collective Agreement Act* essentially concerns: • possible extension to entire province, not limited to specific region as previously; • making more matters compulsory; • wage set by decree no longer a minimum; employer can no longer pay wage "different" from that stipulated in decree.
40.3	S.Q. 40, c. 39 22/6/40	*Minimum Wage Act* (group C)	This act covers the majority of employees, and creates a Minimum Wage Commission to replace the Reasonable Wages Board. The Commission's role is to act as conciliator to associations requesting its assistance in negotiating a collective agreement; acting by order to set minimum wages, hours of work, apprenticeship conditions, ratio of journeymen to apprentices, etc.; it is also a supervising and controlling body.

41.1	S.Q. 41, c. 59 9/5/41	*An Act to Amend the Professional Syndicates Act* (group C)	Whereas previously only the admission of non-citizens to a syndicate in numbers exceeding one-third of its membership resulted in dissolution, the amendment adds: "The reduction of the number of members of the syndicate in good standing to less than twenty shall also involve the dissolution of such syndicate, *pleno juro*."
41.2	S.Q. 41, c. 64 29/4/41	*An Act to Amend the Workmen's Compensation Act* (group C)	An injured worker may not exercise recourse against the servants or mandataries of the employer of the injured worker by reason of any fault committed in the performance of their duties.
42 (e)			
43.1	S.Q. 43, c. 29 23/6/43	*An Act Respecting the Payment of Family Allowances under Collective Labour Agreements* (group C)	Amends the *Collective Agreements Act*. A decree may provide for family allowances to be paid through employer to employee as trustee for beneficiary of allowance (child or other person).
44.1	S.Q. 44, c. 30 3/2/44	*An Act to Constitute a Labour Relations Board (Labour Relations Act)* (group B)	Recognizes right of association and right to strike, makes collective bargaining compulsory, concerns organization of labour relations. Creates Labour Relations Board of the Province of Quebec.

Legislative Output, 1940–1984
General Description

Number (a)	Reference (b)	Title (c)	Object (d)
44.2	S.Q. 44, c. 31 3/2/44	*An Act Respecting the Arbitration of Disputes between Public Services and Their Employees (Public Service Employees Disputes Act)* (group D)	The *Labour Relations Act* applies to public services and their employees; this act contains certain amendments, including prohibition of strikes and lockouts under any circumstances and compulsory arbitration as provided for in the collective agreement, if any and if it so provides, and otherwise under the provisions of the Quebec *Trade Disputes' Act*.
45.1	S.Q. 45, c. 41 24/5/45	*An Act to Assist Apprenticeship and the Enhancing of Human Capital (Apprenticeship Assistance Act)* (group A)	Sets up apprenticeship centres and establishes apprenticeship commissions to administer the centres.
45.2	S.Q. 45, c. 44 24/5/45	*An Act to Amend the Labour Relations Act* (group B)	Whereas previously an association was required to have 60 percent of the employees to be considered a "collective representative," it now needs to have only an absolute majority.
46.1	S.Q. 46, c. 21 17/4/46	*An Act to Insure the Progress of Education* (group D)	No dispute between rural school corporations and their male and female teachers can be submitted to an arbitration or conciliation commission. In cities and towns having a population of 10,000 or more, decisions of arbitration commissions shall be submitted for the approval of the Quebec Municipal Commission.

47.1	S.Q. 47, c. 52 28/3/47	*An Act to Amend the Professional Syndicates Act* (group B)	Twenty Canadian citizens are required to incorporate; corporate existence terminates if more than one-third of its members are not Canadian citizens, or if the number of its members who are Canadian citizens and in good standing is reduced to less than twenty. "The incorporation of *La Confédération des travailleurs catholiques du Canada* is validated and legalized" (s. 6).
47.2	S.Q. 47, c. 54 10/5/47	*An Act Respecting Municipal and School Corporations and Their Employees* (group D)	Disputes between municipal and school corporations and their employees to be submitted to a council of arbitration; "The council of arbitration must take into account, in deciding the dispute, the financial standing of such corporation, its capacity to meet the additional obligations resulting to it from the award and the taxes which already burden its ratepayers" (s. 24b). Provides right of appeal to Quebec Municipal Commission, which may adjust the award in light of the financial aspect.
48 (e)			
49 (e)			
50.1	S.Q. 50, c. 37 5/4/50	*An Act Respecting Public Order* (group B)	Any association having among its members municipal policemen or firemen shall not be qualified for certification or to make collective agreements.

Legislative Output, 1940–1984
General Description

Number (a)	Reference (b)	Title (c)	Object (d)
51.1	S.Q. 50–51, c. 34 7/3/51	*An Act Respecting the Duration of Collective Agreements* (group B)	A collective agreement may be made for one, two or three years, but for no longer. May be made for one year with automatic renewal clause. Between two agreements, parties may extend an existing agreement for a period of less than one year, or make a new one to cover the interval between the end of the preceding agreement and the beginning of the one projected.
51.2	S.Q. 50–51, c. 36 14/2/51	*An Act Respecting the Labour Relations Board and Councils of Arbitration* (group B)	Amends the *Labour Relations Act* and *Trade Disputes' Act*, adding: "No writ of *quo warranto*, of *mandamus*, of *certiorari*, of prohibition or injunction may be issued against the Board (s. 34: against a council of arbitration) or against any of its members on account of a decision, a procedure or any act whatsoever relating to the exercise of [their] functions" (s. 41a).
52.1	S.Q. 52–53, c. 15 18/12/52	*An Act to Eliminate Delays in the Settlement of Disputes between Employees and Employers* (group B)	Amends the *Labour Relations Act* and *Trade Disputes' Act*, adding to the sections previously amended in 1951 the stipulation that decisions of the Labour Relations Board and councils of arbitration shall be without appeal and cannot be revised by the courts.
53 (e)			
54.1	S.Q. 53–54, c. 10 28/1/54	*An Act to Amend the Labour Relations Act* (group C)	An association which tolerates communists among its organizers or officers cannot be regarded as a bona fide organization or recognized as a representative in collective bargaining, as from February 3, 1944.

54.2	S.Q. 53–54, c. 11 28/1/54	*An Act to Amend the Public Service Employees Disputes Act* (group C)	Section 5 previously stipulated that any strike or lock-out was prohibited under any circumstances, subject to a fine; now the association loses the right to be recognized, i.e., loses its certification.
55 (e)			
56 (e)			
57 (e)			
58 (e)			
59.1	S.Q. 59–60, c. 8 18/12/59	*An Act to Amend the Labour Relations Act* (group B)	Adds recourse to Labour Relations Board for dismissal for union activities (burden of proof on the employer). Adds penalty in case of failure of employer to recognize an association of employees (but removes option of imprisonment).
60.1	S.Q. 59–60, c. 47 10/3/60	*An Act to Amend the Act to Insure the Progress of Education* (group D)	Disputes between rural school corporations and their male and female teachers may now be submitted to a conciliation or arbitration council, with the approval of the Corporation générale des instituteurs et institutrices catholiques.
61.1	S.Q. 60–61, c. 72 25/5/61	*An Act Concerning the Confederation of National Trade Unions* (group B)	Changes the name of the Confédération des travailleurs catholiques du Canada (established in 1947 by an amendment to the *Professional Syndicates Act*) to Confederation of National Trade Unions in English and Confédération des syndicats nationaux in French.

Legislative Output, 1940–1984
General Description

Number (a)	Reference (b)	Title (c)	Object (d)
61.2	S.Q. 60–61, c. 73 10/6/61	*An Act to Amend the Labour Relations Act* (group B)	Adds stipulation that "[Assignment of an enterprise] in whole or in part, shall not invalidate any certificate issued by the Board, any collective agreement or any proceeding for the securing of a certificate or for the making or carrying out of a collective agreement." Maintains conditions of employment from the filing of a petition for certification until the right to strike or lock out is gained. Strikes and lockouts prohibited under any circumstances during the period of a collective agreement.
61.3	S.Q. 60–61, c. 74 10/6/61	*An Act Respecting Collective Agreements in the Construction Industry* (group B)	Amends *Collective Agreement Act* by adding special provisions for construction industry prohibiting strikes, lockouts, slowdowns and picketing. Decree has the effect of suspending application of sections of *Labour Relations Act* pertaining to right of association and negotiating collective agreements.
62.1	S.Q. 62, c. 42 6/7/62	*An Act to Amend the Collective Agreement Act* (group C)	The words "family allowances" are replaced by "social security benefits."
63.1	S.Q. 63, c. 99 13/3/63	*An Act Respecting the Society of Industrial Relations Counselors* (group C)	Creates this society, whose aims are "promoting the moral, professional, scientific, social and economic advancement of the industrial relations counselors of the province and ensuring competence and probity in the practice of the profession" (s. 4).

64.1	S.Q. 64, c. 45 31/7/64	*Labour Code* (group B)	Deals with labour relations as they relate to exercise of the right of association, certification, negotiation of collective agreements, settlement of disputes, and regulation of strikes and lockouts. Creates the Labour Court. Replaces a number of acts, among them: • *Labour Relations Act* (1944); • *Quebec Trade Disputes' Act* (1901); • *An Act Respecting Investigations into Industrial Disputes* (1932); • *Public Service Employees Disputes Act* (1944); • *An Act Respecting Municipal and School Corporations and Their Employees* (1947); • *An Act Respecting Public Order* (1950).
64.2	S.Q. 64, c. 46 31/7/64	*An Act Respecting Discrimination in Employment* (group C)	This act, administered by the Minimum Wage Commission, prohibits discrimination in hiring, promotion, layoffs, dismissal and conditions of employment for employees (s. 2); in admitting, suspending or expelling a member from a union (s. 3).
65.1	S.Q. 65, c. 14 6/8/65	*Civil Service Act* (group D)	Sets terms for collective bargaining in the civil service (ss. 68 to 75); Grants right to strike as of January 31, 1966, except for peace officers [right is suspended until that date] (s. 75).
66 (e)			
67.1	S.Q. 66–67, c. 63 17/2/67	*An Act to Ensure for Children the Right to Education and to Institute a New Schooling Collective Agreement Plan* (group D)	Orders return to work for Quebec school teachers who were on strike. Extends duration of collective agreements. Sets remuneration for teachers.

Legislative Output, 1940–1984
General Description

Number (a)	Reference (b)	Title (c)	Object (d)
67.2	S.Q. 67, c. 1 21/10/67	*An Act to Ensure for Users the Resumption of the Normal Services of the Montreal Transportation Commission* (group D)	Orders return to work for MTC workers, on strike for the previous month. Extends duration of collective agreement with certain amendments to conditions of employment. Provides a dispute settlement procedure.
68.1	S.Q. 68, c. 19 5/7/68	*An Act Respecting the Québec Police Force Syndical Plan* (group D)	Sets out syndical plan (collective bargaining) for members of Quebec Police Force. Strikes prohibited at any time, compulsory arbitration.
68.2	S.Q. 68, c. 43 18/12/68	*Labour and Manpower Department Act* (group C)	Formation of Labour and Manpower Department, replacing the old Labour Department.
68.3	S.Q. 68, c. 44 18/12/68	*Advisory Council on Labour and Manpower Act* (group C)	Creation of an agency to advise the minister of labour and manpower on any matter within his competence, and undertake or cause studies and research to be carried out on any question pertaining to the field of labour and manpower.
68.4	S.Q. 68, c. 45 18/12/68	*Construction Industry Labour Relations Act* (group B)	Exempts construction industry from provisions of the *Labour Code* and the *Collective Agreement Decrees Act*. Creates a special labour relations system, with negotiation at provincial level and a single decree for the whole industry. A parity committee, made up of representative associations who have signed a collective agreement subject to a decree, shall supervise and ensure the carrying out of the provisions of the decree.

68.5	S.Q. 68, c. 46 18/12/68	*An Act to Amend the Industrial and Commercial Establishments Act* (group A)	Maximum number of working hours for boys under 18 years of age, girls and women reduced to 9 hours per day (from 10); maximum work week of 50 hours, between 7 a.m. and 6 p.m. Section 18a, concerning employment of women at night, added. Minister of labour and manpower must request opinion of certified syndicate [union] before granting permit to schedule a third shift for night work.
69.1	S.Q. 69, c. 14 28/11/69	*Civil Service Department Act* (group D)	The minister is responsible for negotiating collective agreements to which the government is a party and for supervising application of such agreements; amends the *Civil Service Act*.
69.2	S.Q. 69, c. 23 7/10/69	*An Act to Ensure the Protection of Police and Fire Services to the Citizens of Montreal* (group D)	Orders return to work for Police Department and Fire Department employees.
69.3	S.Q. 69, c. 47 13/6/69	*An Act to Amend the Labour Code* (group B)	Abolishes the Labour Relations Commission, replaces it with a system of investigators, investigation commissioners and the Labour Court; immediately amended by the *Act to Amend the Labour Code and Other Legislative Provisions*, S.Q. 1969, c. 48 (23/10/69).
69.4	S.Q. 69, c. 49 12/12/69	*An Act to Amend the Collective Agreement Decrees Act* (group C)	Government may order or repeal settlements by parity committees. Parity committees may be placed under trusteeship (suspension of powers).

Legislative Output, 1940–1984
General Description

Number (a)	Reference (b)	Title (c)	Object (d)
69.5	S.Q. 69, c. 51 13/6/69	*Manpower Vocational Training and Qualification Act* (group A)	Sets up a system enabling any adult to obtain the qualification needed to exercise a trade. Provides for creation of regional Manpower Vocational Training Commissions, which are responsible for establishing vocational training centres. Standardization and supervision of vocational training (qualification, apprenticeship, qualification certificates).
69.6	S.Q. 69, c. 68 23/10/69	*An Act to Ensure the Right to Education to the Pupils of the* Commission scolaire régionale de Chambly (group D)	Orders employees of the Chambly school board to perform their duties and comply with the provisions of the Sessional Papers described in the Act, which are a collective agreement within the meaning of the *Labour Code*.
70.1	S.Q. 70, c. 17 19/12/70	*Financial Administration Act* (group D)	Establishes a Treasury Board, which exercises the powers of the Lieutenant-Governor in Council in all matters concerning "approval of organization plans for government departments and bodies, the civil servants required for the management of such departments and bodies, *the conditions of employment of their staff*, . . . " [emphasis ours].
70.2	S.Q. 70, c. 34 8/8/70	*An Act Respecting the Construction Industry* (group C)	Ends a work stoppage in the construction industry. Sets out conditions of employment applicable until they are established by decree. Strikes and lockouts prohibited until conditions of employment for all employees have been established by decree.

70.3	S.Q. 70, c. 35 19/12/70	*An Act to Amend the Construction Industry Labour Relations Act* (group C)	Field of application of the Act is specified and a building commissioner is appointed to resolve any difficulty of interpretation or application relating to the field of application. Quebec Hydro-Electric Commission is excluded from the Act.
70.4	S.Q. 70, c. 40 16/10/70	*An Act Respecting Medical Services* (group C)	Orders resumption of services for medical specialists. An Inquiry Commission is constituted to determine whether medical specialists are in fact providing their professional services as usual from November 16, 1970 to July 19, 1972. In case of a "concerted cessation or slackening of usual activity," the Lieutenant-Governor in Council may order a return to work.
71.1	S.Q. 71, c. 12 30/6/71	*An Act Respecting Collective Negotiations in the Education and Hospital Sectors* (group D)	Collective bargaining at the provincial level for all employees in education and hospital sectors; validity of certain stipulations negotiated at provincial level. Temporary law, ceases to have effect on last expiry date of an agreement negotiated and approved at provincial level.
71.2	S.Q. 71, c. 46 30/6/71	*An Act to Amend the Construction Industry Labour Relations Act and the Supplemental Pension Plans Act* (group C)	Establishes the Construction Industry Commission, responsible for supervising the application of and overseeing any decree relating to the construction industry (in place of the Minimum Wage Commission). (The CIC assumed its duties on November 1, 1971.) Establishes the Construction Industry Social Benefits Committee, responsible for application of the provisions of any decree relating to insurance and superannuation plans in the construction industry; acts as an advisory body to the Quebec Pension Board.

Legislative Output, 1940–1984
General Description

Number (a)	Reference (b)	Title (c)	Object (d)
72.1	S.Q. 72, c. 7 21/4/72	*An Act to Ensure Resumption of Services in the Public Sector* (group D)	Orders a return to work. Sets provisional conditions of employment and prohibits strikes or lockouts until June 30, 1972. Calls Parliamentary Committee on the Civil Service. If there is no agreement between the association of employees and the employer, conditions of employment are determined by decree.
72.2	S.Q. 72, c. 8 30/6/72	*An Act to Amend the Act to Ensure Resumption of Services in the Public Sector* (group D)	Strikes out the words "or, failing it, until the 30th of June 1972" after "until the conditions of employment of all the employees have been established by law." Amendments to settlement procedure.
72.3	S.Q. 72, c. 9 15/11/72	*An Act Respecting the Essential Services of Hydro-Québec* (group D)	Interprets meaning of "essential services" and orders maintenance of these services during a strike or lockout.
72.4	S.Q. 72, c. 10 29/3/72	*An Act to Amend the Construction Industry Labour Relations Act* (group C)	An employee cannot belong to more than one association of employees. Fines for infringement of union freedom.
72.5	S.Q. 72, c. 63 8/7/72	*An Act to Again Amend the Professional Syndicates Act and Other Legislation* (group B)	Corporation constituted under the name of Centrale des syndicats démocratiques (CSD).

73.1	S.Q. 73, c. 28 1/6/73	*An Act to Amend the Construction Industry Labour Relations Act* (group C)	Representative associations recognized by chief investigation commissioner if having jurisdiction throughout the province of Quebec for all trades. Representativeness determined by chief investigation commissioner taking the arithmetic average of three percentages involving number of employees, levies paid, and number of hours worked. Representativeness of more than 50 percent required (in both association of employees and association of employers) to negotiate and sign a collective agreement.
74.1	S.Q. 74, c. 8 24/12/74	*An Act Respecting Collective Bargaining in the Sectors of Education, Social Affairs and Government Agencies* (group D)	Organizes negotiations at provincial level. Defines procedures for determining negotiable matters by level of negotiation. Determines the parties to negotiation.
74.2	S.Q. 74, c. 38 24/12/74	*An Act to Amend the Construction Industry Labour Relations Act* (group C)	The Lieutenant-Governor in Council may extend, repeal or amend the decree without the consent of the parties, if it is in the public interest.
74.3	S.Q. 74, c. 116 17/7/74	*An Act Respecting the Placing of the "International Union of Elevator Constructors, Locals 89 and 101" under Trusteeship* (group C)	Places International Union of Elevator Constructors, locals 89 and 101, under trusteeship.

Legislative Output, 1940–1984
General Description

Number (a)	Reference (b)	Title (c)	Object (d)
75.1	S.Q. 75, c. 6 27/6/75	*Charter of Rights and Freedoms* (group A)	Fundamental freedoms: discrimination prohibited in hiring (s. 16); by an association of employers or employees (s. 17); by an employment bureau (s. 18); equal pay for equivalent work (s. 19); on grounds listed in s. 10: race, colour, sex, civil status, religion, political convictions, language, ethnic or national origin, social condition; fair and reasonable conditions of employment (s. 46). Establishes the Commission des droits de la personne [human rights commission].
75.2	S.Q. 75, c. 16 19/12/75	*An Act Respecting Anti-Inflation Measures* (group C)	Applicable to all fields within the constitutional jurisdiction of Quebec; objective is to combat inflation, particularly in restraining profit margins, prices, dividends and compensation. Establishes an Inflation Control Commission and an Anti-Inflation Measures Appeal Board.
75.3	S.Q. 75, c. 19 20/11/75	*Construction Industry Complementary Social Benefits Plans Act* (group C)	The Office de la construction du Québec, in place of the Pension Board, administers supplemental employee benefit plans, including a construction industry pension plan.
75.4	S.Q. 75, c. 49 27/6/75	*An Act to Amend the Industrial and Commercial Establishments Act* (group A)	Removes distinctions between employment of men and of women, while maintaining special conditions of employment for young people. Head of industrial establishment obligated to submit plans and specifications [for new construction or alterations] to an inspector.

75.5	S.Q. 75, c. 50 22/5/75	*An Act to Amend the Construction Industry Labour Relations Act* (group C)	Persons found guilty of a criminal offence cannot hold a union leadership position. Presumption of guilt in case of an illegal strike or lockout. Job-site steward elected by secret ballot; steward's duties. Employee is obliged to install materials on order of employer; "Any agreement respecting the utilization of materials bearing the union label is null *ipso facto*."
75.6	S.Q. 75, c. 51 27/6/75	*An Act to Establish the Office de la Construction du Québec and to Again Amend the Construction Industry Labour Relations Act* (group C)	Establishes the Office de la construction du Québec, responsible primarily for applying the decree and the construction industry fringe benefits plan (Construction Industry Commission and Construction Industry Social Benefits Committee abolished). Establishes a Joint Committee on Construction, made up on a parity basis, to rule on any dispute involving interpretation of the decree.
75.7	S.Q. 75, c. 52 19/12/75	*An Act to Ensure the Provision of Essential Health Services and Social Services in the Event of a Labour Dispute* (group D)	" . . . a strike or lockout in an establishment is prohibited unless the parties are entitled thereto under the Labour Code and a prior agreement has been concluded between the parties respecting the essential services which must be maintained during a strike or a lockout and respecting the manner in which such services are to be maintained or unless, failing such an agreement between the parties, a decision is rendered by the commissioner or an assistant commissioner . . . "
75.8	S.Q. 75, c. 55 27/6/75	*An Act Respecting Indemnities for Victims of Asbestosis and Silicosis in Mines and Quarries* (group A)	This act, administered by Workmen's Compensation Commission, provides lump-sum indemnities for victims of these occupational diseases.

Legislative Output, 1940–1984
General Description

Number (a)	Reference (b)	Title (c)	Object (d)
75.9	S.Q. 75, c. 56 27/9/75	*An Act to Ensure Users the Resumption of the Normal Services of the Montreal Urban Community Transit Commission* (group D)	Orders return to work for MUCTC workers and resumption of normal transit services. Sets provisional conditions of employment. Dispute settlement procedure: conciliation, arbitration.
75.10	S.Q. 75, c. 57 22/5/75	*An Act Respecting the Placing of Certain Labour Unions under Trusteeship* (group C)	Places local 144 of plumbers, local 791 of operating engineers, and local 1677 of electrical workers unions, QFL affiliates, under trusteeship. Trusteeship of locals 89 and 101 of elevator constructors is extended.
76.1	S.Q. 76, c. 26 9/4/76	*An Act to Amend the Professional Syndicates Act* (group B)	Repeal of s. 7: "Minors of sixteen years of age and married women, except when the husbands object, may be members of a professional syndicate" (R.S. 1941, c. 162, s. 4); replaced by: "A minor sixteen years of age may be a member of a professional syndicate."
76.2	S.Q. 76, c. 29 24/7/76	*An Act Respecting Health Services in Certain Establishments* (group D)	Orders return to work for nurses whose conditions of employment have not been determined by agreement before July 23, 1976. Sets conditions of employment.
76.3	S.Q. 76, c. 38 9/4/76	*An Act Respecting the Maintaining of Services in the Sector of Education and Repealing a Certain Legislative Provision* (group D)	Strikes, lockouts, slowdowns prohibited for employees of a college or school board for a period of 80 days. "Commissioners for school disputes" appointed to investigate the dispute.

76.4	S.Q. 76, c. 72 14/4/76	*An Act to Incorporate the Association of Building Contractors of Quebec* (group B)	ABCQ is incorporated and is granted the appropriate powers. Its bylaws and regulations are those approved under S.Q. 75, c. 51.
77.1	S.Q. 77, c. 5 26/8/77	*Charter of the French Language* (group C)	French is the official language of work (ss. 41–50): communications from employer to staff; language of collective agreements, arbitration awards, decisions rendered under the *Labour Code*.
77.2	S.Q. 77, c. 6 19/12/77	*An Act to Amend the Charter of Rights and Freedoms* (group A)	Amends s. 10 by adding "sexual orientation" to the list of prohibited grounds for discrimination.
77.3	S.Q. 77, c. 41 22/12/77	*An Act to Amend the Labour Code and the Labour and Manpower Department Act* (group B)	Amendments concern: • better protection for right of association; s. 19 a) to e) added on certain obligations of certified associations, including requirement of strike vote by secret ballot; • facilitation of certification (35 percent required); compulsory checkoff of union dues (Rand formula); • negotiating a collective agreement: conciliation becomes voluntary except for first contract (right to strike gained on expiry of collective agreement); • settlement of disputes: new provisions for arbitration of first collective agreement, s. 81 a) to i); and for arbitration of grievances, ss. 88 to 91; • strikes and lockouts: anti-strikebreaking provisions (s. 97); strikes prohibited only for municipal policemen and firemen and peace officers (s. 1 m).

Legislative Output, 1940–1984
General Description

Number (a)	Reference (b)	Title (c)	Object (d)
77.4	S.Q. 77, c. 43 29/11/77	*An Act to Amend the Act Respecting the Placing of the "International Union of Elevator Constructors, locals 89 and 101" under Trusteeship and the Act Respecting the Placing of Certain Labour Unions under Trusteeship* (group C)	Provides for the possibility of extension of trusteeship by order-in-council when a group in which the members of a union participate carries on activities normally entrusted to such union.
78.1	S.Q. 78, c. 5 8/6/78	*National Holiday Act* (group A)	Declares June 24, St. John the Baptist's Day, the National Holiday, a paid statutory public holiday.
78.2	S.Q. 78, c. 14 23/6/78	*An Act Respecting the Organization of the Management and Union Parties in View of Collective Bargaining in the Sectors of Education, Social Affairs and Government Agencies* (group A)	Determines mode of negotiating collective agreements in the education and social affairs sectors, and which stipulations of agreements are to be negotiated at the national, regional or local level. Identifies the parties (bargaining agents). Role of Treasury Board: " . . . authorizes the negotiation mandates of the management committees in matters that it considers to be of governmental concern."
78.3	S.Q. 78, c. 15 23/6/78	*Civil Service Act* (group D)	Establishes l'Office du recrutement et de la sélection du personnel de la fonction publique [recruitment and selection board]. The Commission de la fonction publique [public service commission] becomes an appeal body for decisions by the recruitment and selection board.

78.4	S.Q. 78, c. 52 23/6/78	*An Act to Amend the Labour Code* (group D)	Establishes a committee of information on negotiation in the public and parapublic sectors, and defines the committee's mode of operation. Establishes a committee on the maintenance of health services and social services in the event of a labour dispute.
78.5	S.Q. 78, c. 53 8/6/78	*An Act to Amend the Minimum Wage Act* (group C)	Changes in maternity leave and compensation. Employer is prohibited from dismissing, suspending or transferring an employee because of the employee's exercise of a right under this Act; recourse provided to Labour Commissioner.
78.6	S.Q. 78, c. 57 22/12/78	*An Act to Amend the Workmen's Compensation Act and Other Legislation* (group A)	Amends compensation for victims of accidents or occupational diseases. Extends field of application of Act to agricultural industry and specifies status of artisans and non-remunerated workers.
78.7	S.Q. 78, c. 58 23/6/78	*An Act to Amend the Construction Industry Labour Relations Act* (group C)	Appeal in the matter of placement: to Labour Court for matters concerning the issuing of a placement agency licence; to placement commissioner established under the Act for matters concerning the issuing of a classification certificate previously refused by the OCQ.
78.8	S.Q. 78, c. 68 13/6/78	*An Act to Establish the Institut national de productivité* (group A)	Creation of the *Institut*, whose objectives are "to acquaint the population and the economic agents with the notion of productivity . . . to promote awareness of the importance of productivity . . . to promote cooperation . . . in order to increase productivity."

Legislative Output, 1940–1984
General Description

Number (a)	Reference (b)	Title (c)	Object (d)
79.1	S.Q. 79, c. 3 15/2/79	*An Act to Again Amend the Minimum Wage Act* (group C)	Excludes from the field of application of the Act workers governed by a decree adopted under the *Collective Agreement Decrees Act*, except for application of the ordinance respecting maternity leave.
79.2	S.Q. 79, c. 9 30/5/79	*An Act Respecting Work Income Supplement* (group C)	Gives family entitlement to a work income supplement for one year, with certain conditions.
79.3	S.Q. 79, c. 45 22/6/79	*An Act Respecting Labour Standards* (group C)	Replaces *Minimum Wage Act*. Sets minimum employment standards, includes Divisions dealing with: wages, hours of work, statutory general holidays and non-working days with pay, annual leave with pay, rest periods and miscellaneous leaves, prior notice and work certificate.
79.4	S.Q. 79, c. 50 12/11/79	*An Act Respecting Proposals to Employees in the Education, Social Affairs and Civil Service Sectors* (group D)	Establishes deadlines for tabling management proposals and for consultation of employees.
79.5	S.Q. 79, c. 62 18/12/79	*An Act to Ensure the Maintaining of Electrical Services and to Provide the Conditions of Employment of the Employees of Hydro-Québec* (group D)	Orders a return to work.

79.6	S.Q. 79, c. 63 21/12/79	*An Act Respecting Occupational Health and Safety* (group A)	Provides mechanisms for participation by employees and employers in eliminating the causes of accidents and occupational diseases. Establishes rights and obligations of employees, employers, owners and suppliers subject to the Act in this regard. Employee has the right to refuse particular work, and a pregnant female employee has the right to protective reassignment if the work is physically dangerous to her unborn child or to herself by reason of her pregnancy.
80.1	S.Q. 80, c. 1 24/3/80	*An Act to Ensure the Resumption of Certain Services of the City of Montréal and the Communauté urbaine de Montréal* (group D)	Orders a return to work. No loss of seniority during the strike. Dispute referred to an arbitrator.
80.2	S.Q. 80, c. 5 10/4/80	*An Act to Amend the Act Respecting Labour Standards and the Act Respecting Manpower Vocational Training and Qualification* (group A)	Defines the terms *dismissal* and *collective dismissal* [dismissal of not fewer than 10 employees in 2 consecutive months], terms not previously defined by the *Manpower Vocational Training and Qualification Act*; a layoff of more than six months' duration is considered to be a dismissal.
80.3	S.Q. 80, c. 22 24/10/80	*An Act Respecting Certain Disputes between Teachers and School Boards* (group D)	Orders school boards to do what is necessary to see services are provided, and orders the association of employees to take appropriate measures to induce teachers to appear for work and perform all their duties. Conditions of employment already approved in May 1980 apply. Refers all disputes (local and regional) to an arbitrator.

Legislative Output, 1940–1984
General Description

Number (a)	Reference (b)	Title (c)	Object (d)
80.4	S.Q. 80, c. 23 4/12/80	*An Act to Amend the Act Respecting Labour Relations in the Construction Industry, and Respecting the Representativeness of Certain Representative Associations* (group C)	Five associations may be recognized; FTQ-Construction is added. Vote of allegiance for members affected by split between the FTQ-Construction and the Conseil provincial du Québec des métiers de la construction, under the supervision of the OCQ.
81.1	S.Q. 81, c. 3 12/6/81	*An Act to Amend the Civil Service Act* (group D)	The minister is to "propose to the Government measures designed to ensure equal opportunity in employment . . ." Describes duties of the Office de recrutement et de sélection.
81.2	S.Q. 81, c. 20 19/21/81	*An Act to Amend the Civil Service Act* (group D)	Allows bargaining unit to be split into seven separate groups, with separate certification for each group. Affiliation with existing federations prohibited. Right to strike prohibited for all groups. Establishes a joint parity committee for negotiating.
82.1	S.Q. 82, c. 1 15/1/82	*An Act Respecting the Transit Service of the Commission de transport de la Communauté urbaine de Montréal* (group D)	Orders a return to work and suspends the right to strike during the period of extension of the collective agreement. Extends collective agreement until May 11, 1982, if an agreement is not reached. Employer and union are obligated to take appropriate measures so that work is performed as usual. Should the dispute subsist on March 11, the government shall appoint a board of inquiry, which will report not later than May 11.

82.2	S.Q. 82, c. 12 1/4/82	*An Act Respecting the Abolition of Compulsory Retirement and Providing Amendments to Certain Legislation* (group A)	Employee is entitled to continue to work despite attaining the age or number of years of service at which he should retire pursuant to the provisions governing such retirement.
82.3	S.Q. 82, c. 16 11/5/82	*An Act to Amend the Professional Code and the Labour Code* (group C)	"Except on a question of jurisdiction, no extraordinary recourse contemplated in articles 834 to 850 of the Code of Civil Procedure shall be exercised and no injunction granted against any council of arbitration, court of arbitration, certification agent, labour commissioner or the Court acting in their official capacities (s. 5). Adds that, except on a question of jurisdiction, art. 33 of the *Code of Civil Procedure* does not apply to the abovementioned persons and agencies.
82.4	S.Q. 82, c. 20	*An Act Respecting Resumption of the Dispensation of Medical Care in Quebec* (group D)	Orders a return to work for general practitioners and the reopening of medical establishments. Medical association is obligated to induce members to comply with the Act. Sets conditions of employment by Sessional Paper, temporarily. Negotiation compulsory.
82.5	S.Q. 82, c. 35 23/6/82	*An Act Respecting Remuneration in the Public Sector* (group D)	Extends by three months those collective agreements in the public and parapublic sectors and government agencies that were in force on May 26, 1982 and are due to expire on December 31, 1982. Excludes persons performing the duties of a peace officer and members of the Sûreté du Québec [Quebec Police Force].

Legislative Output, 1940–1984
General Description

Number (a)	Reference (b)	Title (c)	Object (d)
82.6	S.Q. 82, c. 37 23/6/82	*An Act to Amend the Labour Code, the Code of Civil Procedure and Other Legislation* (group D)	A council is established under the name of Conseil des services essentiels; its duty is to "further the awareness of the parties in respect of the maintenance of essential services during a strike." Empowers the government to order the maintenance of essential services in a public service. Parties are obligated to negotiate essential services in these sectors; right to strike is limited.
82.7	S.Q. 82, c. 43 6/11/82	*An Act to Ensure the Resumption of Public Transit Service in the Territory of the Communauté urbaine de Québec* (group D)	Orders a return to work. Renews collective agreement, with certain negotiated amendments, until December 25, 1983. Employer is obligated to take appropriate measures for resumption of service. Sets out wage rates, indexing, retroactivity, and occupational disability.
82.8	S.Q. 82, c. 45 11/12/82	*An Act Respecting the Conditions of Employment in the Public Sector* (group D)	Applies to public and parapublic sectors, government agencies, and universities. Excludes persons performing the duties of a peace officer and members of the Sûreté du Québec [Quebec Police Force]. Determines remuneration for the period of January 1 to February 1, 1983. Government may amend collective agreements that were extended for three months by decree.

82.9	S.Q. 82, c. 53 16/12/82	*An Act Respecting the Ministère du travail and Amending Various Other Legislation* (group C)	Establishes the Ministère du travail and the Ministère de la main-d'oeuvre et de la sécurité du revenu, and sets out their respective functions.
82.10	S.Q. 82, c. 61 18/12/82	*An Act to Amend the Charter of Rights and Freedoms* (group A)	Adds age, except as provided by law, and pregnancy to prohibited grounds for discrimination. Prohibits the requesting of information, on an application form or in an interview, on the grounds described in s. 10 of the Charter. Employer is prohibited from dismissing, refusing to hire, or otherwise penalizing an individual because of his having been found guilty or having admitted being guilty of a penal or criminal offence (except an offence committed in the course of the employment). New section dealing with affirmative action programs, which are deemed to be non-discriminatory. Such programs must be approved by the commission.
83.1	S.Q. 83, c. 5 12/5/83	*An Act to Ensure the Resumption of Public Transit Service in the Territory of the Communauté urbaine de Montréal* (group D)	Orders the resumption of public transit service. Makes the Act respecting the placing of certain labour unions under trusteeship applicable to the Syndicat du transport de Montréal (Employés des services d'entretien [CSN]).
83.2	S.Q. 83, c. 58 23/6/83	*An Act to Establish the Fonds de solidarité des travailleurs du Québec (F.T.Q.)* (group C)	Establishes an investment fund with the primary purpose of giving financial assistance to Quebec enterprise, so as to keep or create jobs, stimulate the economy, contribute to the training of working men and women in Quebec, and promote their participation in the development of Quebec enterprise. Sets out organization of the fund and defines its principal functions.

Legislative Output, 1940–1984
General Description

Number (a)	Reference (b)	Title (c)	Object (d)
83.3	S.Q. 83, c. 12 20/6/83	*An Act to Favour Early Retirement and Improve the Surviving Spouse's Pension* (group A)	Allows payment of retirement pension when the contributor has attained sixty years of age, with actuarial adjustment. Allows payment of disability pension to individuals between 60 and 64 years of age who are incapable of carrying on their gainful occupation.
83.4	S.Q. 83, c. 13 20/6/83	*An Act to Amend the Act Respecting Labour Relations in the Construction Industry* (group C)	Determines the scope of both interpretations of the decree by the Joint Committee on Construction and decisions handed down by the building commissioner. Specifies rules applicable to conciliation and arbitration of complaints. Relaxes procedure for recovery of wages in case of a company bankruptcy or a winding-up order. Provides for a vote of union allegiance in the fall of 1983, and confirms legality of the creation of the present Joint Committee in 1982.
83.5	S.Q. 83, c. 17 23/6/83	*An Act Respecting the Adoption of Chapters 35 and 45 of the Statutes of 1982 and Amending Certain Conditions of Employment in the Public Sector* (group D)	Assures the validity of the sessional papers referred to in the Act respecting remuneration in the public sector and the Act respecting the conditions of employment in the public sector.

83.6	S.Q. 83, c. 22 23/6/83	*An Act to Amend the Labour Code and Various Legislation* (group B)	Broadens protection of the right of association. Confirms the rule of first filing with respect to petitions for certification regarding a group of non-unionized employees; representative nature of the petitioning association may be decided on at any time; certification may by decided by simple majority when there is more than one petitioning association. Speeds up arbitration of disputes and grievances, by replacing the council or court of arbitration with a single commissioner. Tightens up anti-strikebreaking provisions.
83.7	S.Q. 83, c. 55 22/12/83	*Public Service Act* (group D)	Revision of the *Civil Service Act*. Abolishes the Ministère de la fonction publique and the Office du recrutement et de la sélection du personnel, replaced by the Conseil du trésor and the Office des ressources humaines. Conseil du trésor is responsible for establishing general policies in human resource management, setting up affirmative action programs, and negotiating and supervising the application of collective agreements. The Office des ressources humaines is responsible for recruitment and promotion of public servants. The Commission de la fonction publique is empowered to hear appeals brought by public servants; the commission also ensures observance of the Act and regulations with respect to the recruitment and promotion of public servants. The syndical plan (collective bargaining) is retained, with only a few adjustments in concordance.

Notes

This study is a translation of the original French-language text which was completed in May 1984.

1. Descriptions of the object of these legislative acts are taken from Gérard Dion, *Dictionnaire canadien des relations du travail* (Quebec City: Les Presses de l'Université Laval, 1976), pp. 594–614 [and from the wording of the acts themselves]. This is, needless to say, not an exhaustive review.
2. Denys Dion, "Loi des syndicats professionels de Québec," 10 *Revue du Barreau*, 145ff.; M.L. Beaulieu, *Les conflits de droit dans les rapports collectifs du travail* (Quebec City: Presses de l'Université Laval, 1955), p. 114 ff.
3. Beaulieu, *supra*, note 2, p. 137, and Jean-Louis Dubé, "Le régime général d'extension juridique des conventions collectives" (1976), *Revue de droit, Université de Sherbrooke* 79.
4. B. Laskin, *Actes du Deuxième congrès international de travail* (Geneva, 1956), p. 156.
5. *Industry and Humanity: A Study of the Principles Underlying Industrial Reconstruction* (Toronto: University of Toronto Press, 1973) (first edition, 1918).
6. A.E. Grauer, *Labour Legislation*, a study prepared for the Royal Commission on Dominion-Provincial Relations (Ottawa, 1939), p. 1.
7. Ibid., p. 5. See also the Quebec *Act Respecting the Limiting of Working Hours*, 1933. The economic situation in 1984 would seem to have revived the issue of better distribution of working time.
8. Ibid., p. 9.
9. J.H. Gagné and G. Trudel, *La législation du travail dans la Province de Québec (1900–1953)*, study prepared for the Quebec Royal Commission of Inquiry on Constitutional Problems, 1955.
10. *Task Force on Labour Relations, Canadian Industrial Relations Report* (Ottawa: Privy Council Office, 1968), p. 13.
11. *Minimum Wage Act*, S.Q. 40, c. 39. The same two clauses are repeated in the *Collective Agreement Act*, S.Q. 40, c. 38.
12. Léon Mercier Gouin, *Cours de droit industriel* (Montreal: École des Hautes Études commerciales, 1937).
13. Appendix A describes each of the 112 laws in terms of these four categories.
14. In Appendix A, these 16 laws are numbered 45.1, 68.5, 69.5, 75.1, 75.4, 75.8, 77.2, 78.1, 78.6, 78.8, 79.2, 79.6, 80.2, 82.2, 82.10 and 83.3.
15. Appendix A, laws numbered 45.1, 69.5, 80.2, 82.2 and 83.3.
16. In a situation of high unemployment, is it better to assist a retired older worker or support an unemployed youth out of school and looking for work? To answer this question, social, political, economic and financial aspects must be considered together.
17. Because of the importance of this act (79.6 in Appendix A), we will return to it in the third section.
18. Appendix A, 40.2, 44.1, 45.2, 47.1, 50.1, 51.1, 51.2, 52.1, 59.1, 61.1, 61.2, 61.3, 64.1, 68.4, 69.3, 72.5, 76.1, 76.4, 77.3 and 83.6.
19. Laws involving intervention in the building sector are listed in group C.
20. Group C includes these 38 laws: 40.1, 40.3, 41.1, 41.2, 43.1, 54.1, 54.2, 62.1, 63.1, 64.2, 68.2, 68.3, 69.4, 70.2, 70.3, 70.4, 71.2, 72.4, 73.1, 74.1, 74.2, 74.3, 75.2, 75.3, 75.5, 75.6, 75.10, 77.1, 77.4, 78.5, 78.7, 79.1, 79.3, 80.4, 82.3, 82.9, 83.2 and 83.4 in Appendix A.
21. We listed 17 laws passed between 1968 and 1983 concerning labour relations or parties in the construction sector: 68.4, 70.2, 70.3, 71.2, 72.4, 73.1, 74.2, 74.3, 75.3, 75.5, 75.6, 75.10, 76.4, 77.4, 78.7, 80.4 and 83.4.
22. Gérard Hébert, *Le syndicalisme dans l'industrie de la construction* (Montreal: Université de Montréal, École des relations industrielles, 1980); Gérard Hébert, *Labour*

Relations in the Quebec Construction Industry, Part I: *The System of Labour Relations* (Ottawa: Economic Council of Canada, 1977); C. Leclerc and J. Sexton, *La sécurité d'emploi dans l'industrie de la construction au Québec* (Quebec City: Presses de l'Université Laval, 1983).

23. There are few, if any, equivalents to these two items anywhere else in North America.
24. The features of the *Act Respecting Labour Standards* (79.3) are outlined in the next section under "The Legislator's Response."
25. One need only read the Advisory Council's annual reports to appreciate the work that it does and the desirability of such channels of communication; F. Morin, "La consultation: un défi pour un ministre du travail" (1970), *Québec-Travail* 7.
26. Even though the principal interests of the parties remain in conflict, biases may be overcome through better knowledge of each other's issues, etc.
27. This approach had been suggested unanimously by members of the Advisory Council on Labour and Manpower in 1970 and put forward again in 1974 in the Council's *Annual Report*, 1973–74, p. 27.
28. For a critical analysis of this system, see *L'avenir des négociations dans les secteurs public et para-public*, symposium held by the *Fédération des CEGEPs*, October 1983, report published by the Fédération.
29. The process normally used to legislate in this area is itself revealing of a rather critical collective obsessive fear: bills are tabled just prior to resumption of negotiations or at the end of the session, without any real debate, etc.
30. Charles M. Fehmus, *Public Employment Labor Relations: An Overview of Eleven Nations* (Michigan: Wayne State University, Institute of Labor and Industrial Relations, 1975). Included are eleven monographs on labour relations in the public sector in Canada, Belgium, Australia, Japan, England, Sweden, West Germany, and the United States.
31. As examples, a law was required to force the employer to bargain with the workers' union representative, and assuming of responsibility for no-fault compensation for accidents was achieved through legislative means.
32. Beyond initial appearances, style and tone, which varied, recommendations and proposals made by union federations at their conventions in the 1940s asked for just as much state intervention as did those of the 1980s. For example, see J.R. Cardin, *L'influence du syndicalisme national catholique sur le droit syndical québécois*, Cahiers de l'Institut social populaire, June 1957, 78 pp.
33. QFL, *Rapport du 15e congrès* [report of 15th annual convention], 1977, p. 26.
34. CPQ, *Bulletin sur les relations du travail* (141), (April 1983), p. 4.
35. Ibid.
36. CSD, "Renouvellement du Code du travail," *La Base*, 1982, p. 49.
37. *Supra*, note 33, p. 32.
38. CPQ, *La négociation sectorielle*, conclusion of a brief on sector-based negotiation to labour minister Pierre Marois, March 1982, vol. 13, no. 130, April 1982, p. 10.
39. *Supra*, note 33, p. 29.
40. Ibid., p. 50.
41. CNTU, *Pour une loi qui assure vraiment la santé et la sécurité au travail*, brief prepared for meeting of CNTU estates-general on health and safety, held in Quebec City on December 10, 1978; reprinted for regional conventions, winter 1979, p. 4.
42. Ibid., p. 11.
43. Ibid., p. 15.
44. Ibid., p. 19.
45. CPQ, brief to parliamentary committee on labour and manpower re Bill 17, *An Act Respecting Occupational Health and Safety*, August 1979, pp. 2–3.
46. *Supra*, note 33, p. 38.
47. CNTU, *Du travail pour tout le monde*, manifesto of working men and women victim of plant shutdowns and collective dismissals; supplement to *Nouvelles CSN* [CNTU newsletter], February 1982, p. 35.

48. Ibid., p. 45.
49. Ghislain Dufour, CPQ vice-president, in *La sécurité d'emploi* (Quebec City: Laval University, Department of Industrial Relations, Les Presses de l'Université Laval, 1978), p. 174.
50. *Supra*, note 33, p. 20.
51. CPQ, *Services essentiels* 14 (138) (January 1983).
52. Ibid.
53. Advisory Council on Labour and Manpower, *Annual Report*, 1973–74, p. 23.
54. Advisory Council on Labour and Manpower, *Annual Report*, 1981–82, p. 22.
55. For purposes of this study, it was unimportant to report on the most recent union and management demands on each of these issues, or to have an equal number of examples from each of the union federations.
56. The history of labour legislation in England under Labour and Conservative governments clearly illustrates this process. While the coming to power of one or the other of the parties dictated a change of direction in labour legislation, the changes were not radical; J. Clark and Lord Wedderburn, *Labour Law and Industrial Relations* (Oxford: Clarendon Press, 1983).
57. *Le Devoir*, May 25, 1960, quoted in Jean-Louis Roy, *Les programmes électoraux du Québec*, vol. 2 (Ottawa: Léméac, 1971), p. 377.
58. February 20, 1940: 1st Session, 21st Legislature, p. 7.
59. February 23, 1943: 4th Session, 21st Legislature, p. 4.
60. January 18, 1944: 5th Session, 21st Legislature, p. 6.
61. January 19, 1949: 1st Session, 23rd Legislature, p. 8.
62. November 18, 1953: 2nd Session, 24th Legislature, p. 6.
63. January 9, 1962: 3rd Session, 26th Legislature, p. 8.
64. January 15, 1963: 1st Session, 27th Legislature, pp. 6–7.
65. January 14, 1964: 3rd Session, 27th Legislature, p. 4.
66. January 25, 1966: 6th Session, 27th Legislature, p. 7.
67. December 1, 1966: 1st Session, 28th Legislature, p. 13.
68. February 20, 1968: 3rd Session, 28th Legislature, p. 7.
69. March 15, 1973: 4th Session, 29th Legislature, p. 3.
70. June 27, 1973: 1st Session, 30th Legislature.
71. March 14, 1974: 2nd Session, 30th Legislature.
72. March 18, 1975: 3rd Session, 30th Legislature.
73. March 16, 1976: 4th Session, 30th Legislature.
74. March 8, 1977: 2nd Session, 31st Legislature.
75. February 21, 1978: 3rd Session, 31st Legislature.
76. March 6, 1979: 4th Session, 31st Legislature.
77. November 5, 1980: 6th Session, 31st Legislature.
78. May 19, 1981: 1st Session, 32nd Legislature.
79. November 9, 1981: 3rd Session, 32nd Legislature.
80. March 23, 1983: 4th Session, 32nd Legislature.
81. *The Ordinance of Laborers* of 1349; the end purpose sought at the time was similar to that of the *Anti-Inflation Act* of 1976.
82. By way of illustration, we may note that amendments to ss. 3, 36.1, 47 and 100.12 of the *Labour Code* are direct legislative responses to judicial decisions.
83. In some countries, working conditions are established directly by law, while in others they have been developed more through collective bargaining. Otto Kahn-Freund, *Labour and the Law*; H.H. Wellington, *Labor and the Legal Process*; Philip Ross, *The Government as a Source of Union Power*, (Providence, R.I.: Brown University Press, 1965).
84. [1976] 2 S.C.R. 200, at p. 218, Dickson J. In choosing to have the right of property take

precedence, this case clearly illustrates that judges, in general, reflect only the opinion of the circles in which they move.

85. This is because the field of legislative power of each of the states is smaller than the socio-economic territorial plateau on which labour relations are played out.
86. In a way, the two substantial parts of the rule of law are acted upon differently: the conditioning or antecedent is in the end decreed by regulation, while the consequent is stated in the act.
87. H. Millis and E. Brown, *From the Wagner Act to Taft-Hartley* (Chicago: University of Chicago Press, 1950); Louis L. Jaffe, "Law Making by Private Groups," in *Harvard Law Review* 1937, 201; and Ross, *supra*, note 83.
88. This was the experience in Quebec from 1934 on, when, under the *Collective Agreement Decrees Act*, the state extended the collective agreement, as is the case at present in the construction industry. These two examples alone reflect the situation to be found in a number of countries, France in particular.
89. In such a situation, the state combines its intervention roles as employer, legislator and peacemaker. In the next few years, the government will no doubt have to set to work to sort out and weigh the effects of this confusion of roles in 1983 in the education and health sectors.
90. Even when the state acquires ownership of the enterprise or the attributes of ownership (management control), the status of employees is not altered in practice or in law, nor is the nature of collective or individual labour relations changed.
91. Study published by the Advisory Council on Labour and Manpower, February 26, 1984, *Activités du bureau du Commissaire du travail* [Activities of labour commissioner's office].
92. OHSA, s. 4; LSA, s. 94; and LC, s. 62.
93. The latter argument seems to have had some success. In many cases, it was agreed simply to incorporate the legal standard into the collective agreement to allow for quicker application, rather than wait for regulations governing its application.
94. The process may be less perceptible, but remains similar to the technique used by taxation to retain savings through conditional tax credits.
95. The presence of collective agreements in the same sector justifies employees' demands for a similar arrangement, and employers yield, in whole or in part, to satisfy their employees and thereby avoid a petition for certification.
96. When the act was promulgated, the unions opposing it were few indeed. The advent of the *Act Respecting Labour Standards* was felt to be a necessity.
97. The *Workmen's Compensation Act* was limited to providing a certain degree of financial support to accident prevention associations.
98. Section 239 of the *Health and Safety Act* suggests, on the contrary, that the employer's liability is in fact increased: the abstract, idyllic model of the typical manager and prudent administrator no longer sufficed to circumscribe the positive scope of the employer's liability, and a precise model was now articulated in the act.
99. *Collective Agreement Decrees Act*, R.S.Q. 1977, c. D-2, s. 1(j); similar definitions are found in the *Labour Relations Act*, S.Q. 1944, c. 30, and the *Minimum Wage Act*, R.S.Q. 1964, c. 144.
100. R.W. Rideout, *Principles of Labour Law*, 3d ed. (London: Sweet and Maxwell, 1979), pp. 6–15 (description of hemming and hawing of British case law).
101. Michel Aglietta and Antoine Brenter, *Les métamorphoses de la société salariale* (Calman-Lévy, 1984).
102. An example is given in Saskatchewan's *Trade Union Act*, R.S.S. 1978, c. T-17, s. 2: " . . . any person engaged by another person to perform services if, in the opinion of the board, the relationship between those persons is such that the terms of the contract between them can be the subject of collective bargaining; . . ."
103. As in giving medication to a patient, where the patient's previous medication must be taken into account, the prescribing of a legal measure, while it may be good by itself, must also be done in terms of existing rules and possible combined effects.
104. We will examine only the fate reserved for the certified union, precisely because of the

latter qualification. Our remarks do not directly concern unions or the trade union movement regarded as being outside the system of collective labour relations structured under the *Labour Code*.

105. *Seafarers' International Union of North America v. Stern*, [1961] S.C.R. 682, at p. 692.
106. Otto Kahn-Freund, "Trade Union Democracy and the Law" (1961), 22 *Ohio State L.J.* 4, at p. 8.
107. The growing numbers of unaffiliated unions may be explained by the trend to inward withdrawal.
108. *The Patino Mining Corporation v. Les métallurgistes unis d'Amérique*, [1967] R.D.T. 65; *Banks v. Upper Lakes Shipping Limited* [1963] B.R. 910; *Syndicat des employés de l'hôpital Saint-Augustin v. Procureur général de la province de Québec* [1977] C.A. 539; *United Steel Workers of America v. Gaspé Copper Mine Ltd.* [1965] C.S. 51.
109. Bill 111, 1983, section 18. The formula is not new: it was used in the construction sector in 1974–75.
110. Under the parliamentary system, if the premier commits himself to the bargaining table and asks for legislative support if necessary, he will most certainly get it. There can be no real negotiation at that point, and the role of the law can only suffer in the long term.
111. Some of the Labour Court's decisions emphasize this phenomenon.
112. S. 86.1 ff. of the Charter, which take effect in 1985.
113. *Code of Civil Procedure*, art. 999 ff. (collective recourse).
114. *St-Pierre v. Le Syndicat des fonctionnaires provinciaux du Québec Inc. et al.*, [1979] C.P. 67 (D.P.C.); *D'Orsonnens v. Canadian Air Lines Pilot [sic] Association et al.*, [1977] C.P. 280, p. 284 (D.C.P.). Cf. *Viau v. Canadian Air Lines Pilot [sic] Association et al.*, C.P. no. 520-32-000843-763, April 3, 1979; *Syndicat des postiers du Canada v. Santana Inc.*, [1978] C.A. 114, p. 117.
115. Marcel Pépin, "L'évolution récente en matière de responsabilité civile des syndicats" (1981) 41 *R. du B.* 584; for a preliminary analysis concerning the exercise of this new recourse, see Hubert Reid, "La Loi sur le recours collectif: premières interprétations judiciaires" (1979), 39 *R. du B.* 1018, 1029. In one particular case, involving the St-Charles Borromée hospital and its users, the union opted for an out-of-court settlement.
116. *An Act to Amend the Labour Code, the Code of Civil Procedure and Other Legislation*, Bill 72 (Assented to June 23, 1982), 3rd Session, 32nd Legislature, ss. 20 to 26.
117. The federal and the British Columbia governments have also experienced problems with their employees, giving rise to special legislation.
118. Jack Barbash, *The Elements of Industrial Relations* (Madison: University of Wisconsin Press, 1984), p. 117.
119. *Labour Law and Industrial Relations* (Oxford: Clarendon Press, 1983), p. 133.
120. Professor Marie-Louis Beaulieu, as early as 1955, hinted at this eventuality resulting from the mere presence of the *Labour Relations Act*: *Les conflits de droit dans les rapports collectifs du travail* (Quebec City: Presses de l'Université Laval, 1955), p. 427 ff.
121. These three adjectives, in a negative way, mean that negotiation should not concern itself simply with local, minor adjustments, that it should not be the work of mere technicians, and that it should not be a simple "mental health" exercise of confrontation and letting off steam.
122. These are the only sectors where the active population is increasing. See Table 2–3.
123. Gérard Lyon-Caen, "La concentration du capital et le droit du travail," *Droit social*, May 1983, p. 287 ff.
124. Between 1965 and 1983, the Treasury Board gradually changed from simply a coordinator and supervisor of collective bargaining to a lead player, the government's agent.

3

Urban Law and Policy Development in Canada: *The Myth and the Reality*

S.M. MAKUCH

Introduction

This paper examines the underlying assumptions about municipal and planning law in Canada since 1945, evaluates the validity of those assumptions and comments on possible future developments in this facet of the law. It concentrates on planning authority because this is the most important aspect of municipal jurisdiction and because the Commission's major interest is the development prospects for Canada.

The study argues that the legal system of municipal and planning powers is based on a number of invalid or at least questionable assumptions about urban growth and urban policy, planning and rule of law values, and the municipal determination of urban policy. These subjects will be discussed at length later, but the three assumptions are as follows.

Because most development is undertaken by the private sector, urban policy is achieved primarily by controlling private sector development. Since urban growth will not abate in the foreseeable future, a major policy problem will be controlling how that growth is carried out by private enterprise. Urban policy, and the legal controls by which it is implemented, has to take account of this problem, rather than concern itself with slow growth, declining growth rates, and the means of stimulating urban growth.

Since it is assumed that controlling urban growth is a rational process carried out in the public interest, the extent of that growth can be accurately predicted and policies and laws can be prepared and advanced to control it. This assumption postulates a static end-state concept of planning, based on the view that one can determine a desirable pattern for development, and that rules can be set in place to ensure

that development conforms to that end-state. Moreover, since we are dealing with property rights, rule-of-law values become paramount and the rules for controlling physical development must be set out in advance. Those rules should be clear, concise, predictable and understandable, and should be decided upon and applied by impartial arbiters.

Growth should be controlled by municipalities, since this level of government deals primarily with the physical development of land. Therefore, urban policy is largely conceived in this paper as municipal policy.

It may be argued that these assumptions conflict with certain current realities:

1. It is difficult to affect substantial private urban development through traditional regulatory devices. Furthermore, public investment and development are critically important in the implementation of urban policy; public works, such as roads, airports, hospitals, schools, parks and housing developments, are crucial in determining development patterns. Private and public investment decisions are the most important factors determining urban growth.

2. Planning is not an entirely rational process, and there is no monolithic "public interest" that has to be considered. Planning decisions, such as whether to build an expressway, increase population densities, or preserve neighbourhoods, are not really based on rational planning principles; they are rather political decisions based on particular value judgments.

It is impossible to predict too far into the future, because circumstances, technology and values are changing so rapidly. For this reason, it is not easy to formulate plans and expect urban growth to conform with those plans so that a prescribed end can be arrived at. Zoning is regarded as a major tool in controlling development: it establishes clear rules in advance, and controls the incidence of subdivisions. Yet zoning has never worked very well in Canada; it is only a facade for the extra-legal techniques — such as spot zoning, development agreements and levies — that have grown up to control development. Changes in planning legislation can be seen in part as an attempt to authorize a bargaining system retroactively because of the failures of zoning and other formal legal structures. Legislative changes have occurred to sanction a discretionary and flexible system of development control — one of negotiation and mediation, in which rule-of-law values give way to a more unstructured decision-making process.

3. Urban policy is not really municipal policy at all. The legal and political subservience of municipalities has meant that they do not control the uses of land. A great deal of direct control is imposed by provincial governments and their agencies that oversee municipal deci-

sion making. Clearly, policies developed by the federal and provincial governments are very important in influencing the pattern of urban growth. Narrow planning tools have only a limited impact on urban development because planning policies are formulated under various statutes and powers at the federal and provincial levels of government. The federal income tax policy, for example, has an important effect on development decisions. Provisions in the *Income Tax Act* for multi-unit residential buildings have encouraged a specific type of development, while the depreciation provisions in that act have led to the demolition of certain kinds of older buildings.[1] The use of the interest rate to encourage or discourage construction — an important part of federal economic policy — has had a profound impact on urban development. More directly, Canada Mortgage and Housing Corporation, by implementing the *National Housing Act*,[2] has been of key importance in determining the form of urban development. Provincial governments, too, have played a significant role. In Ontario, for example, the *Housing Development Act*[3] has determined the growth of urban housing, while the *Public Transportation and Highway Improvement Act*[4] has prompted decisions that have influenced the growth of rapid transit systems in the province. In turn, these policies have affected the pattern of urban development. Municipal policy is therefore largely reactive, not proactive, and relates mainly to the form that urban development takes.

And so, although municipal planning powers have been expanding, in the sense of their capacity to exercise a modicum of discretionary control over the details of development, they are not able to affect fundamentally urban growth and urban policy. Municipal authority is limited to controlling private development that occurs anyway. Municipalities are legally, politically and financially weak and so have no substantive effect on urban development, whether private or public. The centralized nature of urban planning, it will be seen, has been reinforced by provincial legislation and decisions.

It has been argued that the purpose of municipal government is to respond to local political values and goals.[5] However, if municipalities are to have any effective influence on urban policy by ensuring that it responds to local values, a number of important changes will have to take place. The authority of municipalities will have to be expanded beyond extremely narrowly defined grants of power, which largely relate to regulating the form of development that is taking place; municipal authority will have to be extended so that municipal councils can function in essentially the same manner as senior levels of government; finally, municipal financial resources will have to be broadened considerably.

It is important now for policy makers to re-evaluate their traditional view of the way the present system operates, to develop an awareness of the interrelationship of federal, provincial and municipal policies and their effect on urban development, and to facilitate reform of the urban

policy formation process on the basis of the realities described. To help provide a basis for such a re-evaluation, the present paper examines the way the law has developed and evaluates the legal institutions, processes and policies that affect urban communities. In doing so, local government organization, finance and powers will be assessed, along with the role of the federal and provincial governments.

Urban Growth and Urban Policy

The system of controlling urban development in Canada is premised on a view of development as an essentially private activity. Planning powers to prepare plans, enact zoning bylaws, and administer subdivision and development control are all predicated on the control of private land uses; their roots are to be found in "nuisance" and restrictive covenants, which were once the common law devices for dealing with problems arising from the private uses of land.[6] All provinces and the two territories are governed by planning legislation. The legislation, unlike the *Town and Country Planning Act* of the United Kingdom,[7] does not provide for the nationalization of rights to develop property. Canadian legislation, following the examples of the *Standard State Zoning Enabling Act* of 1922 and 1926 and the *Standard City Planning Enabling Act* of 1928 in the United States, is based on the assumption that, within the limits expressly placed upon the uses to which land can be put, an individual can do with his land as he or she pleases. As Mr. Justice Spence of the Supreme Court of Canada stated in a landmark planning case: "An owner has a prima facie right to utilize his own property in whatever manner he deems fit, subject only to the rights of surrounding owners, e.g. nuisance, etc. This prima facie right may be defeated or superseded by rezoning. . . ."[8]

Planning legislation in Canada generally is modelled on a common pattern. A plan is prepared and adopted by a municipality. It is intended to set out policies for guiding future urban development in the municipality, but it does not itself directly regulate private land uses.[9] Further legal action must be taken to ensure that private land uses conform with the plan; in urban areas, this most often takes the form of zoning and development control bylaws, but in rural communities or those on the fringes of urban areas, where very general zoning restrictions usually apply, subdivision control prevents large tracts of land being apportioned into smaller parcels. Zoning powers enable municipalities to divide up the municipality into small areas and to prohibit certain "uses" of land within those zones.[10] Development control powers enable municipalities to designate areas where more detailed matters such as siting, landscaping, access and servicing can be controlled; these regulate more than merely the kinds of uses to which land can be put.[11] In some cases, the architectural merits of private development projects can be reviewed

and approved by public officials.[12] In cases of subdivision control, the lot size and servicing and road patterns are similarly determined;[13] a degree of architectural control can also be exercised.

In all these techniques, it is important to note that controls are being exercised on private land uses. Zoning is the traditional and most common method of land use control in Canada. Just as restrictive covenants were once a common law method of controlling land uses as land was passed from owner to owner, now zoning and other planning controls restrict the uses to which private land can be put as its ownership changes. Moreover, as restrictive convenants impose negative constraints on the use of land, and must relate to the land being restricted (that is, they cannot impose positive obligations and cannot relate to the users of the land), so most zoning is of a prohibitive and negative nature and refers to the use, and not to the users, of property.[14]

Zoning can also trace its origins to "nuisance," the common law method of dealing with conflicting uses of land. Where there is physical interference with the use of another's property, an action in nuisance can be brought to prevent the owner from using the land unreasonably. Zoning tries to prevent anyone from interfering with another's use and enjoyment of land by separating land uses into different zones.[15] To the extent that subdivision and development control add more detailed regulation to basic zoning powers, they too are premised on the assumption that planning is largely a matter of controlling the private user of land. These regulatory devices do not come into effect unless private development is taking place.

Other less important techniques for controlling land uses, including minimum standards regulations and demolition control, mean that additional private decisions relating to the use of land can be regulated. Minimum standards bylaws are designed to prevent the deterioration of private buildings and lots; they specify requirements for the maintenance and occupancy of buildings and land.[16] Demolition control in Ontario provides municipalities with limited powers to prevent the demolition of residential buildings in order to prevent "block busting." This is a technique whereby certain lots are bought on a street, the buildings on them are then demolished and the lots left vacant to speed up the street's degeneration and the quick and cheap sale of the properties for redevelopment.[17] Such legislation again assumes that development and ownership are to be carried out by the private sector, and that the task of planning is to regulate and control private development.

Yet, although much urban policy and regulation is directed at controlling the private sector, this regulation alone does not determine the course of development. It can merely direct or limit private development. Public investment and development is often more important in affecting the extent of urban growth.

A study by L.S. Bourne has pointed out that in Toronto's central city,

redevelopment has been a continuous and volatile source of urban growth and structural change; he suggests that development can be seen in terms of a replacement process in a city's building stock.[18] The rationale for private development is largely economic. New development occurs not because of zoning or other development control devices, but because of demands that cannot be met by the existing building stock. Buildings may become obsolete either because of deterioration, which creates an economic demand, or because a more profitable use can be found for the land. Complex and variable market forces are thus influential in the development process and are the cornerstones of urban policy. But other factors are also important. Development occurs in particular areas because they are more able to attract new development relative to other areas. That potential can be affected not only by such factors as physical attributes and population density, but by the availability of amenities such as neighbourhood parks, hospitals and schools, and accessibility to the rest of the city by roads and public transit. These latter factors demonstrate that public sector investment and development have a major influence on the rate and pattern of urban development.[19]

It can be argued, therefore, that planning regulations are not the prime force in determining where development occurs or how land is allocated for development. Development is the result of market forces and those forces are dramatically affected by the impact of public goods. The concentration of development along subway routes is not merely a consequence of zoning laws; nor can the development of land made accessible by expressways or water and sewage services be seen simply as a response to subdivision control. The opening up of areas of land for development is clearly affected by the construction of public works. Therefore, although zoning, development control and subdivision control are the major forces that formally determine urban policy in Canada, other factors have an important role too. Development patterns in Canada since 1945 have been subject to zoning and subdivision controls and the details of development have been finely tuned by them, but the major engines for urban policy and urban development are private and public investment. And neither of these is primarily under municipal control.

The very limited planning tools described above are not able to stimulate development or direct it to particular locations. Because planning controls are largely negative in nature, they are merely able to prevent abuses by affecting the form that development will take when it does occur. Decisions providing for the infrastructure necessary for development actually enable it to occur, and it is the private sector that makes the final decision on most development projects, although it is certainly influenced by public sector investments and subsidies. The importance of public and private decisions can be seen in various federal and

provincial programs instituted since 1945. A great deal of development was carried on under the *National Housing Act*,[20] which provided for the subsidization of urban development. This in turn stimulated private development. The multi-unit residential building provision of the *Income Tax Act*[21] encouraged residential development. In such matters as federal/provincial land assemblies, there was some attempt by both those levels of government to supply land to the public sector and to provide housing directly.[22] Where the private sector had no incentive to provide housing that lower income groups could afford, the two levels of government became involved in the direct provision of housing, although not for long.[23] Another example of the interplay of public and private sector initiative can be seen in a decision of the province of Ontario to construct trunk services north of Metropolitan Toronto. This has had a profound impact on development in that part of the region.

It is safe to conclude, therefore, that urban policy has been the result of private sector decisions that have been stimulated by public sector investment.

Planning and Rule-of-Law Values

In discussing planning and rule-of-law values, we looked at a basic assumption of the legal system: that planning is a rational process. Such an assumption is based on the view that an urban policy can be adopted and developed, and that Canada's urban problems can be solved in a rational way. Immediately after World War II, the decision to build social housing and thus reconstruct the decayed core of cities like Toronto was seen as the sensible and rational solution to those cities' problems. Similarly, in the 1960s, urban renewal policies were presented in much the same light. Before the problems of urban growth could be solved, studies were needed, data had to be gathered, and plans had to be prepared.

Planning acts were one response to these problems. The assumption of much planning legislation is that if problems are studied, investigated and analyzed, the right solutions will be found. The purpose of Alberta's *Planning Act* is to:

> provide means whereby plans and related measures may be prepared and adopted to:
> a) achieve the orderly, economic and beneficial development and use of lands and patterns of human settlement, and
> b) maintain and improve the quality of the physical environment within which patterns of human settlement are situated.[24]

The assumption of that act and other planning acts in Canada is that there is an accepted, understood and shared meaning of what is "orderly," "economic," and "beneficial" development, and that the

"improvement of the quality of the physical environment" is an objective process. This in part is why, until recently, planning legislation in Ontario called for the investigation and surveying of physical, social and economic conditions in relation to development,[25] and why the Nova Scotia *Planning Act* called for studies of the "economy, finances, resources, population, land use, transportation facilities, municipal facilities and services of the municipality."[26]

Studies and research are required before legislation can proceed because there is a belief that technical guidance will help the right decisions to be made about physical development. Professional planners have to provide this advice, but decisions cannot be made on the basis of the expediency of ad hoc studies. A standard text on planning puts it this way:

> local government needs an instrument which establishes long range, general policies for the physical development of the community in a co-ordinated unified manner and which can be continually referred to in deciding upon the development issues which come up every week.[27]

Most planning statutes have been based on this traditional view of things. Planning is rational decision making informed by planning principles and supported by extensive studies.

To support this view, a body that is isolated from the political process is often given the task of preparing plans. In Ontario until 1983, plans were prepared for individual municipalities by planning boards which were quite removed from the political process.[28] In other provinces, the local planning board device has not been used, but planning commissions are established to "make technical findings and professional judgments understandable and convincing to legislatures."[29] In Alberta, for example, a Regional Planning Commission prepares a regional plan; the Alberta Planning Board then reviews and makes recommendations on it.[30] In Nova Scotia, there is a Municipal Board, which has authority under the province's *Planning Act* to review municipal and regional development plans and zoning bylaws.[31] In Manitoba, the Manitoba Municipal Board[32] reviews plans and zoning bylaws, while the Ontario Municipal Board performs these and other review functions in that province.[33] The rationale for setting up such boards is to ensure that planning decisions are made with good planning principles and the public interest very much in mind. Such boards, it is argued, can protect both the public and the private interest from "wrong" decisions made by the local council, which after all is a political body.

This traditional assumption of planning legislation in Canada — that planning decisions are rational and should be made in the public interest — permeates many of the decisions of the various boards that are concerned with planning. The Ontario Municipal Board has stated that part of its role is to prevent dollar planning — planning for assessment,

rather than on the basis of good planning principles.[34] The Nova Scotia Planning Appeal Board has stated that its role is to ensure that decisions are made in accordance with "good planning principles."[35] This view is based on false assumptions. Although planning is crucial to obtain information affecting decisions to be made, all it can do is provide a basis for sound judgment. The essence of planning is ultimately political:

> There are no absolutes in planning any more than there are in an act. True, it may be possible to project some remote ideal environment that would win general approval. But in our pluralistic and increasingly complex society it is virtually impossible to reach a consensus on specific and detailed proposals of land use.[36]

So although information provided through planning studies is important for deciding the regulation of land uses, the provision of public services or the protection of material amenities, there is no right or wrong answer to the question, for example, of whether an urban expressway should be constructed. Those who live in the inner city and those whose neighbourhood would be devastated by the expressway naturally will be opposed, and for good reason. The suburbanites who use the expressway to reach their offices in the inner city will be in favour of it because it will make driving to work easier. Studies and technical research are important to recommend the best method of construction, the cost of that construction, the cost of the urban environment, and the real travel time saved, if any, but they cannot tell us which group is right or wrong in wanting its interests served, nor what the public interest should be.

The construction of an apartment building may similarly serve the interest of those seeking accommodation as well as those who own the property, but not those who already have single-family dwellings near the construction site. The battle may well be argued in phrases such as the public interest, good planning principles, preserving neighbourhoods and amenities, adding to the tax base, and the need to provide accommodation, but behind this rhetoric lies the divergent interests and values of those who live in the community in which the apartment block is to be built.

It may be that during the 1950s and 1960s one value system prevailed in Canada — that of progress, growth and development — and that therefore conflict did not arise or at least was not acknowledged. Indeed this value system, it could be argued, was the underlying premise behind planning legislation and the reason for its being based on rational planning. But that value system is clearly no longer universal, if it ever was, and therefore conflicts are constantly arising. ("Thus the planning process as it actually functions today is not a technical exercise, but rather a war among various interests competing for benefits.")[37] Planning is the process whereby those benefits are allocated through the construction of public enterprise, which allows private development to occur, and in a

more limited way through land-use regulation, which controls the details of that development. The Ontario government has responded to this view of planning by abolishing planning boards in most parts of the province and by empowering municipal councils to take over planning responsibilities.[38] It has also tried to emphasize the importance of municipal councils as political bodies by slightly narrowing the availability of appeal to the Ontario Municipal Board.[39]

Accepting the argument that planning is political and is a matter of allocating benefits and burdens in society would lead, one might think, to legislation that provides for flexibility, adaptability, extensive intervention in property rights, and wide powers for municipalities to influence urban development. Although it can be argued that planning legislation has been moving in this direction since 1945, it is clear that the legislation is still premised on an end-state concept of planning; this reflects a rule-of-law model of regulating land uses and a system of planning that sees property rights as paramount and the municipal role as primarily one of limiting decisions made by the private sector. The original idea behind official, municipal or development plans in directing urban growth was that the plan maps out land uses, public works and policies for a long-term period — usually 20–25 years — and that zoning bylaws are to be passed to regulate land uses through general zones that cover significant areas of the municipality, to implement the plan. The end-state vision of where the community wishes its development to be in 20 years was to be found in the plan, the rules (zoning bylaws) were set in place, public works were carried out in accordance with the plan, and nothing further needed to be done. Eventually and inevitably, development would proceed in accordance with the plan and its end-state would be reached.[40] This method of controlling land use is compatible with rule-of-law values, which suggest that all rules should be known in advance, that there should be certainty and predictability as to what an individual might do with his or her land, and that people should be dealt with in groups rather than singly. It is also compatible with the notion of protecting property rights. The property owner knows the rules, and those rules must conform with the plan; if necessary, one can present one's case to one of the review agencies, where a hearing is held and an adjudication made. Moreover, property owners are not dealt with arbitrarily, on an individual or ad hoc basis, because regulation is by zones, which cover substantial tracts of land.

However, this is not how planning is carried out. The classic case of *Scarborough Township v. Bondi*,[41] held that a municipality could zone an individual parcel of land. A single zone could be found in one lot. This judgment was followed in other cases, which similarly held that "discrimination" is not a concept that should be used to invalidate zoning bylaws.[42] As a result of these decisions, municipalities began to "spot zone"; in other words, zone on an individual basis. Moreover, because

development was the function of many other factors, such as lot size and public amenities, legal authority was given to request rezonings on a "spot" basis. The result is that individual amendments are frequently processed in areas where there are heavy pressures for development. Since amending the municipal plan is generally no more difficult than amending a zoning bylaw, municipal plans and zoning bylaws change constantly. The end-state is non-existent. Rules are no longer set out in advance because they are constantly changing. This constant change was and is a major characteristic of the Canadian planning system.[43]

At the same time a consensus has developed that zoning is not a sufficiently detailed and positive tool for controlling development. Because of its negative nature, zoning can prevent the worst or most undesirable forms of development, but it is argued that it also has often prevented the best. Setback, height, bulk and siting are the same in each zone. Little variety is provided within the zones, and buildings constructed to conform with a zoning bylaw look largely the same and are found in the same position on lots. In short, it is felt that zoning makes all developments look the same, be they single family houses, apartment buildings or office towers.[44]

The results of zoning regulations, where they are effective, can be seen only too well by driving through city streets where setbacks, lot sizes, designs and heights are uniform. Zoning sets minimum standards that are in fact maximum limits and leads to monotony and sterility.

Perhaps the most obvious criticism of the zoning system is that it is not based on a realistic assumption, since the implementation of zoning bylaws does not lead to a segregation of uses nor to development that is of a quality that could be achieved with more complete control. Zoning is too cumbersome a tool to deal with the form of development, with architectural design, streetscapes, shadows and landscaping. Zoning regulation is too centred on land-use allocation and uniform standards. Consequently, its standards become minimum standards. Ordinarily, zoning cannot impose conditions or positive obligations since its nature is essentially prohibitive. It cannot easily be used to set up temporary controls or allocate the costs of servicing development. It does not provide different areas of municipalities with distinct techniques for land use control or regulation.

The U.S. National Commission on Urban Problems, in *Problems of Zoning and Land Use Regulations*,[45] pointed out the difficulties of zoning in the United States. For example, if a bylaw stipulated a set number of parking spaces per unit in apartment buildings, developers would lobby to lower that ratio. Similarly, although the density would be as high as a municipality thought would be desirable, developers would probably press to increase it. The American report stated that one of the inherent weaknesses of setting standards was that they simply resulted in the lowest possible standard for community development; furthermore,

they were quickly outmoded and constantly being challenged. In sum, zoning fails to prevent the worst kind of development and frequently inhibits the best or better kinds of development. Moreover, developers cannot be forced to provide amenities such as landscaping, or park land dedication, because of zoning's negative nature; nor can developers be required to pay the cost of services through zoning.

Since the 1960s, certain Canadian municipalities have continued to remedy these zoning problems by using the decision in *Bondi*; this decision enabled municipalities legally to use spot zoning as a method of obtaining more control over private developers. Where land had to be rezoned on an individual basis before development could take place, a municipality could impose numerous requirements on the developer before it agreed to the rezoning by refusing to approve it unless landscaping, lighting, siting, park land, and so on were acceptable to the municipality. Such controls could also be enforced if a developer required some other permission from the municipality, the closing of a road for example, in order to proceed with a development. In Alberta, positive control over development was accidentally provided for in the *Planning Act*[46] shortly after World War II. Nevertheless, although the legislative techniques were different in Alberta, municipalities exercised increasing control over the details of development throughout the 1960s and 1970s. This process of imposing detailed control and positive obligations reached its apogee in 1974 when two Supreme Court of Canada decisions were handed down: *Soo Mill and Lumber Co. Ltd. v. City of Sault Ste. Marie*[47] and *Sanbay Development Ltd. v. the City of London*.[48] In both, the Supreme Court upheld the inclusion of "holding" designations or zones in zoning bylaws. This enabled municipalities to zone land so that it could not be used until the holding category was removed, by amending the bylaw in conformity with an official plan. The municipality would not remove that category until the owner had agreed to meet certain discretionary municipal requirements to do with landscaping, siting, access and egress, the building's lighting and design, and the payment of levies. In validating the holding techniques, which were set out in an official plan and implemented through a zoning bylaw, the Court in law authorized a method of development control that could be imposed at will, subject to the approval of the appropriate administrative review agencies. It was clear that flexibility, the imposition of positive obligations and the ability to deal with individual properties differently were the result of the interpretation of planning legislation that paid scant attention to the values of rationality and rule of law.

In the same period that the Supreme Court of Canada was approving this extra-legislative development control which sanctioned detailed control over the "form" of development, a number of legislative amendments were introduced which specifically authorized the use of development control. The Nova Scotia *Planning Act* (1969), for example, pro-

vided for the establishment of comprehensive development districts. Municipalities are empowered to specify the purpose for which the district is to be developed, the conditions for its development, and to grant approval for development, subject to an agreement containing such terms and conditions as a local council may direct.[49] The Alberta *Planning Act* permits discretionary and conditional zoning,[50] and allows certain districts to be designated as direct control areas.[51] Council may regulate and control the use or the development of lands or buildings in these districts, as it sees fit. The Vancouver Charter grants very broad powers to the city council to designate zones in which there shall be no uniform regulations and in which any person who wishes to carry out development must submit plans and specifications and obtain council's approval for the form of development.[52]

Section 40 of the Ontario *Planning Act* provides perhaps the most circumscribed development review power of all.[53] The act does not abandon zoning, but empowers municipalities to impose certain conditions and to demand agreements with respect to those conditions in areas designated as site plan control areas. Since its enactment in 1973, the Ontario development control legislation has had a difficult history. In 1979, a bylaw passed by the City of Toronto was struck down by the Supreme Court of Canada in part because it did not set out standards in advance that were to be imposed as a condition of development and because landowners did not know for certain what was required of them.[54] Here the court was returning to rule-of-law values it had abandoned in the *Soo Mill*[55] and *Sanbay*[56] cases. Given the Supreme Court's upholding of development control in the absence of specific legislative authorization in those two cases, its judgment in this case was unexpected; even more so because the view that certainty and predictability are required in a bylaw designating a development control area runs counter to the purpose of such legislation, which is to introduce flexibility and detailed control, on a lot by lot basis, into the zoning system. That discretionary approach was upheld in the *Bondi* case.[57]

Under s. 40 of the Ontario act, a municipality with an official plan may, by bylaw, designate the whole or any part of the municipality as a site plan control area. This provision prohibits any person from undertaking development in the area so designated, unless approval has been given to plans showing the location of all buildings and structures to be erected, plans showing the location of all facilities and works to be provided, and/or drawings showing plan elevation and cross-section views for each industrial and commercial building and each residential building of 25 or more dwelling units to be erected. The plans must be sufficient to show: (a) the massing and conceptual design of the proposed building; (b) the relationship of the proposed building to adjacent buildings and streets to which members of the public have access; and (c) the provision of interior walkways, stairs and escalators to which members

of the public can gain access from streets, open spaces and interior walkways in adjacent buildings. Such plans need not include the layout of other interior areas, and the colour, texture and type of materials, window detail, construction details, architectural detail and interior design. The municipality is also empowered to require the owner to provide for the widening of highways abutting the land, access to and from the land, off-street loading and parking, walkways and pedestrian access, lighting, landscaping, waste storage, easements for water and sewage, and grading, and to enter into an agreement respecting these matters and the plans referred to above. The agreement can be registered and will bind subsequent owners of the property.

The essence of all these schemes is that development can be approved on a case-by-case discretionary basis, without the need to pass a bylaw setting out the rules governing the development in advance. Conditions can be imposed as a prerequisite for approving the development. These schemes move away from rule-of-law values. Certain limits on municipal discretion can be seen in the Ontario scheme: architectural control is not allowed; density, height and use cannot be regulated through site plan control.

Legislation for development control in Winnipeg similarly attempts to achieve a balance between certainty and predictability on the one hand and total discretion on the other. The *City of Winnipeg Act*[58] provides for the establishment of development control areas by bylaw (s. 626), within which zoning ceases to operate (s. 628). Development is broadly defined (s. 624), and permission is required before development can take place (s. 628). Conditions can be imposed and an agreement entered into regarding those conditions (s. 632). The problem of unbridled discretion, which zoning was designed to prevent, is alleviated somewhat in the Winnipeg legislation. The act requires that an approved district plan be in place for an area designated as a development control area. A district plan covers an area smaller than the municipality and so should be more detailed than a municipal plan. In granting development permission, the council is to have regard to any material consideration, the Greater Winnipeg development plan, the provisions of the district plan, and the relevant provisions of the action area plan (a very detailed local plan), if any, for the district where the building is situated (s. 633). The act thus attempts to structure municipal discretion by requiring a detailed sub-city plan. Complete control of discretion by the plan would defeat the purpose of development control.

Furthermore, the *City of Winnipeg Act* sets out legislative restrictions on the imposition of conditions, by providing that conditions may be concerned only with one or more of the following (s. 632):

(a) the use of the land, building or structure;
(b) the timing of development;

(c) the siting and design including exterior materials of the proposed building or structure;
(d) traffic control and the provision of parking on the land;
(e) landscaping and grading and provision of open space;
(e.1) the construction of a system, works, plant, pipeline or equipment for the transmission, delivery or furnishing of electricity and water and the collection and disposal of sewage;
(e.2) payment of a sum of money to the city in lieu of the requirement under (e.1).

These limitations on the municipality's authority to impose conditions are an attempt to re-introduce some certainty and predictability to the development control system.

Although it is clear that land use regulation has moved from a rigid to a highly discretionary form of control by means of spot zoning, holding zones, and development review, other discretionary techniques are found in planning legislation. All provinces require subdivision approval. This is a discretionary approval, too, and works in much the same way as development control. An applicant must submit a plan for the subdivision of property, showing such matters as the roads within the subdivision, the lots and the purposes for which they are to be used, the services, the land's natural contours and features, and the existing uses of adjoining land. Unlike zoning, there are no set standards against which to measure the plan, although any development would have to comply with existing zoning. The approving authority, whether provincial or municipal (this varies from province to province, and within provinces), has the discretion to approve the plan. There is no development as of right, as occurs in a pure zoning regime, once the provisions of the bylaws have been met. Under the Alberta act,[59] for example, the approving authority may allow or refuse an application for approval, but may not approve an application, unless (a) the land is suitable for the purpose for which the subdivision is intended; (b) the subdivision conforms to a relevant regional plan, ministerial regional plan, statutory plan and land use bylaw, as well as the act and regulations; and (c) taxes have been paid or arrangements have been made for payment.

Similarly, in Ontario there is no obligation to approve a plan. The act merely provides that when considering a draft plan of subdivision, regard should be had to the health, safety, convenience and welfare of the future inhabitants, and to the following: that the draft plans conform to the official plan and to adjacent plans of the subdivision; whether the subdivision plan is in the public interest; how suitable the land is for the purpose for which it is to be subdivided; highways within the vicinity of the subdivision; the dimension and shape of the lots; restrictions and proposed restrictions on the land, buildings and structures within and adjacent to the subdivision; conservation of natural resources and flood control; the adequacy of utilities and municipal services; the adequacy

of school sites; and the amount of land within the subdivision that will be given over to public purposes.[60] It is clear that approving bodies have extremely wide discretionary powers. The major difference between subdivision control powers and those governing development control appears to be that the former focus less on the form of development and more on lot shape and size, service distribution, and the general physical layout of the area.

Another aspect of subdivision control that makes it akin to development control is that it provides for the imposition of conditions and an agreement respecting the subdivision. The Alberta act refers to conditions necessary to ensure compliance with plans, bylaws and the act itself, and to a condition that the subdivider enter into an agreement with the council respecting construction of, or payment for, public roadways and pedestrian walkways that provide access to the subdivision; the installation of utilities; the construction of, or payment for, off-street parking areas, and for loading and unloading areas; the payment of an off-site levy or a redevelopment levy imposed by bylaw; and, finally, the dedication of land, or payment of money in lieu thereof.[61]

In Ontario, the minister of municipal affairs and housing, or the regional municipality exercising the authority of the minister, may impose certain conditions in approving a plan for a subdivision regarding the dedication of lands for public purposes, including highways, and the widening of abutting highways.[62] The Ontario act has a very broad provision that the minister, as a condition of approval, may require the owner to enter into one or more agreements with a municipality, on such matters as the minister may consider necessary including the provision of municipal services.[63] The Ontario legislation, unlike that in place in Alberta, imposes quite a broad range of conditions. Usually, the minister's condition is a standard one, which states: "that the owner agrees in writing to satisfy all the requirements, financial or otherwise, of the Municipality concerning the provision of roads, installation of services and drainage." The Ontario act further enables municipalities to enter into agreements imposed as a condition of approval of a plan of subdivision.[64]

There are two causes of concern. One is that the discretionary power given to approving authorities may be abused, and like cases may not be treated alike. Another worry is that these wide powers may be used to prevent certain social groups from living in a community. In the past, municipalities have exercised their power to try to use zoning to block uses such as group homes for the handicapped or for former inmates of institutions. Similarly, subdivision and development control might be used to impose conditions that would substantially increase the cost of housing in order to keep lower income groups out of certain neighbourhoods. Furthermore, there is a general concern that the approval process itself restricts the supply of land that is available for residential use and so increases the cost of housing.[65]

A number of studies have been undertaken on the effect that planning controls have on housing costs, but they have been inconclusive; yet it is clear that there have been attempts to keep certain groups out of municipalities or at least out of particular neighbourhoods. The courts have attempted to counteract this tendency. The Supreme Court of Canada in the landmark case of *Bell v. Borough of North York*[66] held that, in Ontario at least, the zoning power cannot be used to regulate the users, as opposed to the use, of land. Yet the distinction between "user" and "use" is primitive at best. It does not prevent indirect regulation, which effectively discriminates against certain groups. This occurred in the Borough of North York, where the municipality zoned an area of land as "residential" to prevent a house being used as a Zoroastrian temple.[67] The distinction in *Bell* may prevent regulation that assists certain groups. It has been held that because of this decision the City of Toronto cannot legislate separately for senior citizen housing and provide less stringent standards for such housing, even though such regulation would lower the cost of the housing.[68] The *Bell* decision does not affect standards that are so high as to impose unnecessarily high costs in development. This problem was raised in the report of the planning act review committee in Ontario.[69] If these difficulties are to be resolved, the courts need to make a more subtle use of the equality provisions of the Canadian Charter of Rights and Freedoms[70] and to interpret more sensitively the planning power of municipalities.

Since World War II, the courts and provincial legislatures have extended municipal planning powers to provide greater flexibility, discretion and control over the form of urban development, while (paradoxically) the courts have restricted certain municipal planning powers to prevent discrimination and legislatures have extended the administrative review of municipal decisions. It seems that the legal system is striving to give municipalities relatively wider discretionary powers, while at the same time restricting that power to ensure that it is not used in a discriminatory manner. More important, however, is the fact that, aside from providing more discretionary authority, there has been no move to give municipalities the ability to control public investment, so that they have a greater say over the kind and extent of private development. Indeed, the focus of municipal planning legislation has been a narrow one: the extent to which municipalities should be able to control the form of urban development. No consideration has been given to the issue of municipalities independently undertaking public sector development or having broader powers to influence it.

The Municipal Determination of Urban Policy

Although municipalities are generally perceived to exercise the planning power in all Canadian provinces, that power is a limited one, relating

only to the form of development; to a large extent, it is provincially controlled, dominated and reviewed. This control is exercised in a number of important ways. Municipal organization, political structure and narrow legislative authority ensure that political and legal power at the municipal level is very weak and diffuse; this makes it difficult for municipalities to take a strong lead in urban policy development. Because municipal financial resources are restricted, planning decisions are biased in favour of development, and municipal capital spending decisions that affect planning are subject to provincial control. Finally, most municipal decisions regarding planning and urban policy are appealable to a provincial review agency.

It can be argued that the present limitations on municipal authority are appropriate for a number of reasons. Broad municipal autonomy can lead to difficulties. Municipalities might compete with each other in providing the best services to their citizens. Some municipalities might demand less stringent codes of public occupational health or pollution standards from industry or may pay firms, by tax breaks or cash payments, to locate within their boundaries.

There are a number of responses to such concerns. First, decisions to lower standards, grant bonuses or increase services are essentially political. Assuming that democracy is functioning well within a municipality, then political decisions should reflect the preferences of the majority of the municipality's inhabitants. Indeed, the purpose of local government is to reflect local values. These decisions are made now at the federal and provincial levels, where purely local values are less important. Secondly, there is no reason to assume that provincial governments and even federal governments would not (as they do now) make grants to municipalities to equalize their fiscal resources and revenue demands. This would go part way toward relieving disparities among municipalities and prevent such decisions from being distorted by the relative wealth of some municipalities. Moreover, to the extent that such decisions encourage new development and thus create wealth within a municipality, then they would accomplish one of the municipalities' goals. Finally, in the absence of a constitutional amendment, provinces could always thwart decisions that run counter to provincial policies or provincial standards, without having to resort to the current detailed control over municipalities. It is clear, therefore, that although there is a rationale for strong local government that reflects local values,[71] the Canadian municipal system runs completely counter to that rationale and ensures that municipalities themselves are merely the administrators of provincial policy.

Municipal institutions in Canada are inherently weak because municipalities are the creatures of the province and have no authority except on matters that have been specifically authorized by statute. Before municipalities can expand their jurisdiction in any area, legislative amendments will have to be made so that there is a constant provincial review and

oversight of what powers and policies municipalities can adopt. Provincial governments determine the breadth of all municipal powers because the judicial doctrine of express authority means that a municipality cannot act without legislative authorization.[72] In giving that authorization, provincial governments review the policies that the municpality can introduce.

Muncipalities lacking provincial authorization cannot engage in different methods of controlling urban land uses by means of, for instance, performance standard zoning or licensing.[73] On a more prosaic level, they cannot provide permit parking or bus lanes without specific authorization.[74] More importantly, they cannot provide daycare services or any unauthorized social welfare schemes, such as job creation, without explicit authority. The important 1937 case of *Morrison v. Kingston*,[75] which essentially held that municipalities cannot act without specific authority and that general grants of power to municipalities are meaningless, has not been altered by legislation or judicial decision. Moreover, two more recent decisions, *Marlborough v. Ottawa Carleton*[76] and *Mississauga v. Province of Ontario*,[77] have upheld the view that municipalities cannot legislate in contravention of policies found in provincial statutes or where provincial regulation occupies a field of jurisdiction.

In addition, because the focus of municipal political power is diffuse, municipalities cannot appropriately reflect local values. This makes it difficult for municipalities to exercise appropriate control over planning or other purely local matters. Many municipalities are quite small (although a number have bigger populations than several of the provinces). There is some concern that democracy will not function properly with a small population base. The fear is that the "logrolling" or political compromising that takes place among various groups in a democratic system will not occur where there is a small population, with the result that one group on the municipal council effectively becomes a permanent majority.[78]

Municipal councils are generally divided, since they are composed of a mayor and aldermen who are not elected by the same constituency (the mayor is elected at large and the aldermen generally by a ward system). The mayor has no special power in the Canadian municipal system. In Ontario, this situation is exacerbated by the board of control system found in the larger cities. These boards were established to divide political matters from administrative affairs, but they often create hostility between the mayor and the council. One can conclude, therefore, that councils are politically weak because of personal divisions created by legislation.[79] Another reason for their weakness is that provincially established special purpose bodies exercise important local powers and thus restrict the powers of municipal councils. In Metropolitan Toronto, for example, there are approximately one hundred local special purpose bodies exercising power in addition to seven municipal councils.[80]

There are special legislative divisions in some jurisdictions between

the power of the councils and the administrative arms of municipal government.[81] The result of all of these controls and limitations is that councils have little capacity to develop and implement municipal policy on their own initiative.[82] This problem is aggravated by the rule against delegation[83] at the municipal level, which means that the most insignificant decisions are often made by municipal councils in the same manner as major decisions. Moreover, the courts' rule against discrimination prevents municipalities from setting up subcategories of groups in its regulations, unless it is specifically authorized.[84] This is a further limitation on policy formulation. The result of all this is that municipal councils become swamped with administrative trivia, are internally divided, and have to relinquish many important powers to other agencies and bodies. Municipal councils, therefore, have a serious inability to develop policy as readily as senior levels of government. Muncipal governments cannot establish administrative tribunals to help them develop policy over time, as federal and provincial governments do. For example, without specific authorization, no municipal tribunal can be established by a muncipal council to deal with planning matters, housing concerns, or the regulation of parks. In this situation, municipalities become administrators of provincial policies, rather than the creators and developers of policies that respond to their own perceptions of their citizens' needs and desires.

Equally important to this severe limitation on a municipality's ability to develop any policy, including planning policy, is its restricted access to the property tax as a major source of revenue. Since 1945, that restriction has given rise to increasing transfer payments from provincial governments to municipalities, to make up for the inadequacy of the property tax as a source of revenue for municipal functions, as well as the transfer of many important functions from the local to the provincial level because of the municipalities' scarce financial resources. This has meant that land use planning decisions have been strongly biased because municipalities are given a strong incentive to plan to increase their assessment base for property tax revenue.[85] The provinces, therefore, have kept control over municipal decision making since World War II, not only by failing to give municipalities effective political and legal autonomy, but by limiting their financial resources. Furthermore, major decisions regarding borrowing come under provincial review, so that any important municipal capital undertakings are also provincially controlled.[86] In sum, the provinces dominate municipal policy making.

Even in the most important area of municipal decison making — planning — provincial domination is clear. Most provinces have provincial agencies or review bodies to oversee municipal planning decisions.[87] It is interesting to note that, in the 1960s and early 1970s, when citizen participation was an important value in government policy formulation, reforms at the municipal level resulted in a greater provincial

review of municipal planning decisions, rather than a major restructuring of the political and legal system, which would have increased openness, access and accountability in local government. Citizens were to be given access to local government through the provincial review of municipal planning decisions and a right to a hearing at the provincial level, rather than through local government reform. J.A. Kennedy, former chairman of the Ontario Municipal Board, summed up the situation this way:

> In the municipal field the same searchlight of public scrutiny does not exist as in the provincial field of government. There is no organized opposition to the government, seeking to expose maladministration, and the theory of ministerial responsiblity does not exist. . . .
>
> In the light of the wide areas of power exercised by local government authorities . . . it would appear that an Ombudsman . . . would perform a useful service in the process of municipal government.
>
> Many times the author has perpetrated something in the nature of a pun by pointing out that the first three letters of Ombudsman are OMB (the letters used in headlines to refer to the Board). However, it is essentially true that in so many matters, including planning, the Board acts as an Ombudsman before the fact, so to speak. It provides a forum in which all parties can be heard after due notice in an adversary proceeding and objective appraisal made in the light of all the circumstances as out at a full, open hearing.[88]

Moreover, since World War II, although there have been local government reforms, especially with respect to regionalization and expanding the boundaries of local government, none of them actually altered the legal or political capacity of local government, although they do enable democracy to function better because of its larger population base. The reforms increased the geographic boundaries of municipal bodies, but in many cases they did not result in the optimum geographic size for a municipality, which must be based on such factors as the social, economic and physical community interest, as well as the municipality's population base.[89] So, in effect, the reforms have not abolished the divisions within municipalities or increased their legal, political, or financial ability to function as governments that can influence and determine urban policy. There has been no major change in the rule against delegation,[90] no major shift in the number of special purpose bodies at the local level, and no major restructuring of municipal finance. Generally, it can be argued that another level of local government — the regional — was introduced to strengthen local government, but it was weakened because the provinces did not give local government the power to govern effectively or to improve its financial viability.

It is not surprising, therefore, that municipalities are merely the administrative agencies of provincial governments. They cannot respond to new problems unless they are specifically authorized to do so

by legislation; they do not have the power to raise money without specific provincial authorization; the borrowing of money is provincially controlled and any major decisions they might make are reviewed by provincial agencies. The period since World War II in Canada can be seen as one where, although municipal authority itself was not eroded, because the municipalities have never been very strong legally, local government has been politically eroded, as provincial governments have begun to play an ever-increasing role in controlling what municipalities can do. This erosion has occurred in the face of increasing discretionary control over the form of urban development. In previous periods, before the rapid urbanization of Canada's municipalities, it can be argued that local councils were able to function as real governments because of their accepted but limited role of providing local public sector development. It is not surprising that since 1945, with the increasing demands made on governments, municipal government has not been able to respond because of its curtailed authority and its limited financial base. Major decisions affecting urban life are made provincially and federally. Municipalities are left controlling the particular form of urban development, under the close supervision of provincial review agencies and the courts.

Conclusion

It has been argued that urban policy is made by both the private and the public sectors. The most important decisions, relating to either public or private sector development, are largely outside the scope of the municipal planning power, which is the major method by which municipalities affect land uses in Canada. There has been a major reform in municipal planning powers to include discretionary and more detailed control over urban development, but that control is provincially and judicially supervised and can be exercised only with respect to one small portion of the many decisions relating to urban policy — the form of the proposed development. Municipalities have few independent powers to provide public sector investment that would substantially affect urban development.

In addition to the limits on their planning power, municipalities are generally subservient to provincial governments, and are structured and organized in such a way that they do not have the facility to make policies as well as do senior levels of government. The internal divisions of municipal councils, the restriction on municipal authority through special purpose bodies and provincial review agencies, the need to have express grants of power, the rule against delegation, and municipalities' restricted financial resources, all limit their ability to develop policy that reflects local values.

Although the Commission has received numerous briefs from municipalities pointing out that municipal governments are best able to appreciate and respond to local values, there is no real provision for them to do

so in the Canadian political system. The legal and political constraints on local governments mean that Canadian urban policy is largely formulated by federal and provincial governments. If governments that can respond to local values are to be created, more financial resources will have to be provided to ensure independent public sector municipal development; general grants of legislative authority will have to be given to municipalities; the rule against delegation should be abolished; a general right to sub-classify should be given; the structure of municipal councils will have to be altered; and special purpose bodies and review agencies should be abolished.

Notes

This paper was completed in January 1985.

1. *Income Tax Act*, S.C. 1970–71–72, c. 63, Reg. Sch. II, Class 31, 32 and s. 13(21).
2. *National Housing Act*, R.S.C. 1970, c. N-10.
3. *Housing Development Act*, R.S.O. 1980, c. 209.
4. *Public Transportation and Highway Improvement Act*, R.S.O. 1980, c. 421.
5. It should be noted that "local values" are not monolithic, any more than the "public interest" is. What is being argued is that concerns and responses to those concerns may vary from municipality to municipality. For example, police relations with minority groups may be an important concern in one municipality but not in others or in a province at large. The purpose of municipal government is to enable a particular concern to be addressed and solved.
6. S.M. Makuch. *Canadian Municipal and Planning Law*. (Toronto: Carswell, 1983), pp. 194–201.
7. *Town and Country Planning Act* (1947), 10 and 11 Geo. 6, c. 51.
8. *Boyd Bldrs. v. Ottawa*, [1965] S.C.R. 408, 50 O.L.R. (2d) 704.
9. See, for example, *Planning Act*, R.S.A. 1980, c. P-9, s. 54; *Planning Act*, S.N.S. 1969, c. 16, s. 19(2); *Planning Act*, S.O. 1983, c. 1, s. 24.
10. See, for example, *Planning Act*, R.S.A. 1980, c. P-9, ss. 68, 69; *Planning Act*, S.N.S. 1969, c. 16, ss. 33, 34; *Planning Act*, S.O. 1983, c. 1, s. 34.
11. See, for example, *Planning Act*, R.S.A. 1980, c. P-9, s. 70; *Planning Act*, S.N.S. 1969, c. 16, ss. 33, 34; *Planning Act*, S.O. 1983, c. 1, s. 40.
12. See, for example, *Planning Act*, S.N.S. 1969, c. 16, s. 34. But s. 40 of the Ontario *Planning Act* specifically excludes control over architectural detail.
13. See, for example, *Planning Act*, R.S.A. 1980, c. P-9, s. 90; *Planning Act*, S.O. 1983, c. 1, s. 50.
14. Makuch, *supra*, note 6, at pp. 197–201.
15. *Ibid.*, pp. 194–97.
16. See, for example, *Planning Act*, S.O. 1983, c. 1, s. 31.
17. See, for example, *Planning Act*, S.O. 1983, c. 1, s. 33; *City of Winnipeg Act*, S.M. 1971, c. 105, s. 485.
18. L.S. Bourne, *Private Redevelopment of the Central City: Spatial Processes of Structural Change in the City of Toronto* (Chicago: University of Chicago Press, 1967).
19. *Ibid.*, pp. 174–76.
20. R.S.C. 1970, c. N-10.
21. S.C. 1970–71–72, c. 63.
22. See M. Dennis and S. Fish, *Low-Income Housing: Programs in Search of a Policy* (Ottawa: Central Mortgage and Housing Corporation, 1972).
23. *Ibid.*

24. *Planning Act*, R.S.A. 1980, c. P-9, s. 2.
25. *Planning Act*, R.S.O. 1980, c. 379, s. 4.
26. *Planning Act*, S.N.S. 1969, c. 16, s. 3.
27. W.I. Goodman, ed., *Principles and Practice of Urban Planning*, 4th ed. (Washington, D.C.: Institute for Training in Municipal Administration, 1968), at p. 351.
28. *Planning Act*, R.S.A. 1980, c. P-9.
29. Goodman, *supra*, note 27, at p. 358.
30. *Planning Act*, R.S.A. 1980, c. P-9.
31. *Municipal Board Act*, S.N.S. 1981, c. 9; *Planning Act*, S.N.S. 1969, c. 16, ss. 16, 35.
32. *Municipal Board Act*, R.S.M. 1970, c. M-240.
33. *Municipal Board Act*, R.S.O. 1980, c. 347.
34. *Re East York By-Law 7633*, September 27, 1966, O.M.B.
35. *Re Lord Nelson Hotel* (1971), 1 N.S. Planning Appeal Board Cases.
36. David B. Greenspan and Michael B. Vaughan, "How the Zoning Game Is Played: A Look at Land Use Procedures" (1970), 6 *Law Society of Upper Canada Gazette* 50.
37. *Ibid.*, at p. 57.
38. *Planning Act*, S.O. 1983, c. 1, s. 17.
39. *Ibid.*, s. 34.
40. For a detailed discussion of this, see S. Makuch, "Zoning: Avenues of Reform" (1973–74), 1 *Dalhousie Law Journal* 2974.
41. *Scarborough Township v. Bondi*, [1959] S.C.R. 444, 18 D.L.R. (2d) 161.
42. *Re North York By-Law 14067*, [1960] O.R. 374, 24 D.L.R. (2d) 12 (C.A.).
43. See Bourne, *supra*, note 18.
44. See Makuch, *supra*, note 40.
45. National Commission on Urban Problems, *Problems of Zoning and Land Use Regulation*, Research Report No. 11, (Washington, D.C., 1968).
46. *The Town and Rural Planning Act*, S.A. 1950, c. 71, s. 11.
47. *Soo Mill & Lumber Co. v. Sault Ste. Marie*, [1975] 2 S.C.R. 78, 47 D.L.R. (3d) 1.
48. *Sanbay Dev. Ltd. v. City of London*, [1975] 1 S.C.R. 485, 45 D.L.R. (3d) 403.
49. *Planning Act*, S.N.S. 1969, c. 16, s. 34.
50. *Planning Act*, R.S.A. 1980, c. P-9, s. 69.
51. *Ibid.*, s. 70.
52. *Vancouver Charter*, S.B.C. 1953, c. 55, s. 565(f).
53. S.O. 1983, c. 1.
54. *Canadian Institute of Public Real Estate Companies v. City of Toronto*, 7 M.P.L.R. 39, [1979] 2 S.C.R. 2, 8 O.M.B.R. 385.
55. *Supra*, note 47.
56. *Supra*, note 48.
57. *Supra*, note 41.
58. S.M. 1971, c. 105.
59. *Planning Act*, R.S.A. 1980, c. P-9, s. 90.
60. *Planning Act*, S.O. 1983, c. 1, s. 50(4).
61. *Planning Act*, R.S.A. 1980, c. P-9, s. 91.
62. *Planning Act*, S.O. 1983, c. 1, s. 50(5).
63. *Ibid.*
64. *Ibid.*, s. 50(6).
65. See D.B. Greenspan, *Down to Earth — The Report of the Federal-Provincial Task Force on the Supply and Price of Serviced Residential Land* (Ottawa: Central Mortgage and Housing Corporation, 1978).
66. *R. v. Bell* (1979), 26 N.R. 457, 98 D.L.R. (3d) 255 (S.C.C.).

67. *H.G. Winton Ltd. v. North York* (1979), 6 M.P.L.R. 1, 20 O.R. (2d) 737, 88 D.L.R. (3d) 733 (Div. Ct.).
68. *Re Toronto By-Law 413-78* (1980), 9 M.P.L.R. 117, 10 O.M.B.R. 38 (O.M.B.); see, however, *Smith v. Township of Tiny*, (1980), 27 O.R. (2d) 690, 12 M.P.L.R. 141, 107 D.L.R. (3d) 483.
69. Greenspan, *supra*, note 65.
70. *The Constitution Act, 1982*, s. 15.
71. See Makuch, *supra*, note 6, at pp. 3–4.
72. See *Ottawa Electric Light Co. v. Ottawa* (1906), 12 O.L.R. 290 (C.A.), at 299, where "Dillon's rule" was adopted.
73. *R. v. Allen (Donald B.) Ltd.* (1976), 11 O.R. (2d) 271, 65 D.L.R. (3d) 599 (H.C.).
74. See *Municipality of Metropolitan Toronto Act*, R.S.O. 1980, c. 314.
75. *Re Morrison and Kingston*, [1938] O.R. 21, [1937] 4 D.L.R. 740 (C.A.).
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77. *A.-G. for Ontario v. City of Mississauga* (1981), 15 M.P.L.R. 212 (C.A.).
78. F.I. Michelman, "Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy" (1977–79), 53 *Indiana Law Journal* 145.
79. For a detailed discussion of this, see Makuch, *supra*, note 6, at pp. 7–18.
80. Bureau of Municipal Research, "The 101 Governments of Metro Toronto," *Civic Affairs*, October 1968.
81. For example, the city manager system that Halifax uses; see *Halifax City Charter*, S.N.S. 1963, c. 52, ss. 158(1), 159(1).
82. For a detailed discussion, see K.D. Jaffary and S.M. Makuch, *Local Decision-Making and Administration* (Toronto: Queen's Printer, 1977).
83. Compare *R. v. Campbell*, [1963] 2 O.R. 149, 38 D.L.R. (2d) 579 (C.A.) with *R. v. Sandler*, [1971] 3 O.R. 614, 21 D.L.R. (3d) 286 (C.A.).
84. Compare *R. v. Donald B. Allen Ltd.* (1976), 11 O.R. (2d) 271 65 D.L.R. (3d) 599 (H.C.) with *City of Ottawa v. Royal Trust Co.* (1964), 45 D.L.R. (2d) 220 (S.C.C.).
85. See T.J. Plunkett, *The Financial Structure and the Decision-Making Process of Canadian Municipal Government* (Ottawa: Central Mortgage and Housing Corporation, 1972).
86. For example, *Ontario Municipal Board Act*, R.S.O. 1980, c. 347, ss. 62, 64, 94 and *Municipal Affairs Act*, S.N.S. 1982, c. 9, s. 6.
87. For example, *Ontario Municipal Board Act*, R.S.O. 1980, c. 347; *Municipal Board Act*, S.N.S. 1981, c. 9; *Municipal Act*, S.M. 1970, c. 100; *Municipal Government Act*, R.S.A. 1980, c. M-26.
88. J.A. Kennedy, "Some Observations on Planning Law," *Law Society of Upper Canada Special Lectures* (Toronto: De Boo, 1970), at p. 162.
89. S.M. Makuch, "Metropolitan Government in a Provincial Context" (1973), 6 *Ottawa Law Review* 51.
90. With the exception of the Ontario *Municipal Act*, R.S.O. 1980, c. 302, s. 106, which grants to municipalities a general power to delegate the holding of a hearing to a committee of council.

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